

No. 12593

United States
Court of Appeals
for the Ninth Circuit.

NELDA SHANAHAN,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY,

Appellee.

Transcript of Record
In Two Volumes
Volume I
(Pages 1 to 346)

Appeal from the United States District Court,
Northern District of California,
Southern Division.

FILED

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PAUL B. O'BRIEN

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

CLERK

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer to Complaint.....	5
Appeal:	
Certificate of Clerk to Record on.....	570
Cost Bond on	15
Designation of Necessary Record and Statement of Points Relied on.....	573
Notice of.....	14
Certificate of Clerk to Record on Appeal.....	570
Complaint	2
Cost Bond on Appeal.....	15
Designation of Necessary Record and State- ment of Points Relied on.....	573
Instructions to the Jury.....	520
Judgment on Verdict	9
Notice of	11
Minute Order Dated April 28, 1950—Plaintiff's Motion for a New Trial Denied.....	12
Motion for a New Trial.....	11
Notice of	13

INDEX	PAGE
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	14
Partial Reporter's Transcript.....	18
Verdict	8
Witnesses, Defendants':	
Andree, Alex M.	
—direct	424
—cross	432
—redirect	435, 436
—recross	436
Cailouette, Noel	
—direct	452
—cross	462
Griffith, Luther L.	
—direct	392
—cross	403, 415
—redirect	422
—recross	423
Henris, John	
—direct	437
—cross	443
Johnson, Lela	
—direct	466
—cross	473, 480

INDEX

PAGE

Witnesses, Defendants'—(Continued):

Kafer, Phillip S.

—direct	347, 353
—cross	360
—redirect	378
—recross	381

Luddon, James R.

—direct	256
—cross	266

Orr, William R.

—direct	198
—cross	205
—redirect	213

Rowe, James R.

—direct	270
—cross	288, 292
—redirect	296, 298
—recross	297

Stainbrook Jesse A.

—direct	298
—cross	311
—redirect	343, 345
—recross	345

INDEX

PAGE

Witnesses, Defendants'—(Continued):

Stephens, Ted

—direct 445

—cross 451

Sublett, Floyd

—direct 214

—cross 224, 238

—redirect 251

Thomas, George W.

—direct 383

—cross 391

Witnesses, Plaintiff's:

Casebeer, Dewey

—direct 160

—cross 174

DeRosa, John L.

—direct 111

—cross 128, 153

Hendrix, Tommy A.

—direct 28

—cross 39

—redirect 52, 54

—recross 53

INDEX

PAGE

Witnesses, Plaintiff's—(Continued)

Hewes, Raymond Arnold

—direct 55

—cross 72, 89

—redirect 103

Shanahan, Nelda

—direct 177, 516

—cross 182

—redirect 183

Tolson, Wayne LeRoy

—direct 503

—cross 513

—redirect 515

Whitfield, Wilbert G.

—direct 497

—cross 499



NAMES AND ADDRESSES OF ATTORNEYS

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SIDNEY P. MURMAN, ESQ.,

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405 Montgomery Street,
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Attorneys for Plaintiff and Appellant.

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DUNNE & DUNNE, ESQS.,

333 Montgomery Street,
San Francisco, California,

Attorneys for Defendant and Appellant
Southern Pacific Company, a corpora-
tion.

In the Southern Division of the United States District Court for the Northern District of California

No. 28770-G

NELDA SHANAHAN,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,
FIRST DOE, SECOND DOE and
THIRD DOE,

Defendants.

COMPLAINT
(Wrongful Death)

Plaintiff complains of defendants and for cause of action alleges:

I.

At all times herein mentioned defendant Southern Pacific Company was and now is a corporation organized and existing under and by virtue of the laws of Kentucky, authorized to transact business in California, and operating a system of railways within California.

II.

At all times herein mentioned defendants First Doe, Second Doe and Third Doe, and each of them, were agents and employees of defendant corporation.

III.

The names of defendants First Doe, Second Doe and Third Doe are fictitious names and plaintiff prays that at such time as the true names of each

of said defendants, so named, are ascertained, plaintiff have leave of court to amend this complaint accordingly.

IV.

Plaintiff is the widow of one Ellis E. Shanahan and the sole heir at law of said Ellis E. Shanahan, deceased.

V.

On or about December 27, 1948, shortly before 8:00 o'clock a.m. of said day, said Ellis E. Shanahan was operating a certain automobile along Howard Street, a public street and thoroughfare in the vicinity of the tracks and right-of-way of defendant corporation in Anderson, California.

At about said time and place, defendants so maintained and operated the crossing signal and vehicle warning device of defendant corporation in such a careless, reckless and negligent manner as to cause a certain locomotive and train of defendant corporation, then and there carelessly, recklessly and negligently proceeding in a southerly direction along said tracks and right-of-way, to strike and collide without warning with said automobile, with great force and violence, demolishing said automobile and causing said Ellis E. Shanahan, the operator thereof, to receive and sustain serious bodily injuries, from which injuries said Ellis E. Shanahan died.

VI.

As a proximate result of the death of said Ellis E. Shanahan, plaintiff was and has been deprived of the support, maintenance, society and comfort of

said deceased and was and has been thereby damaged in the sum of Seventy-five Thousand Dollars (\$75,000.00).

VII.

By reason of the death of said Ellis E. Shanahan, plaintiff was compelled to and did incur certain necessary expenses to date incident to said fatal injuries and said death, the exact amount of which is not presently known.

VIII.

All of said damages resulted solely and proximately from the carelessness, recklessness and negligence of defendants as hereinabove alleged.

Wherefore, plaintiff prays judgment against defendants for general damages in the amount of \$75,000.00, special damages incurred, costs of suit, and such other and further relief as is meet and proper in the premises.

HADSELL, SWEET, INGALLS
& MURMAN,

/s/ SIDNEY P. MURMAN,
Attorneys for Plaintiff.

[Endorsed]: Filed April 6, 1949.

[Title of District Court and Cause.]

ANSWER TO COMPLAINT

Comes Now, Southern Pacific Company, a Delaware corporation (incorrectly named in the complaint as a Kentucky corporation), one of the defendants above named, and answering the complaint of plaintiff on file herein, shows as follows:

I.

At all times mentioned in the complaint and herein defendant Southern Pacific Company was a corporation organized and existing under and by virtue of the laws of the State of Delaware, with a principal place of business in the State of California, in the City and County of San Francisco, and was qualified to do business and doing business, and operating a railway system in the State of California and other States. On December 27, 1948, at approximately 7:45 a.m., Ellis E. Shanahan was driving and operating a certain automobile in a general westerly direction on Howard Street, a public street in Anderson, California, and defendant Southern Pacific Company was operating a certain train in a general southerly direction along the railroad tracks. As said train approached the intersection of said Howard Street and said railroad tracks, Ellis E. Shanahan drove said automobile upon said tracks and collided with the locomotive of said train. J. A. Steinbrock, the engineer, and Philip S. Kofer, the fireman of said train, were employed by defendant Southern Pacific Company.

In said collision, Ellis E. Shanahan was immediately killed, and said automobile was demolished. At the time that Ellis E. Shanahan so drove said automobile on to said tracks, said crossing was protected by certain warning signals which were operating properly according to their construction and design, and actuated by the approach of said train.

II.

Defendant Southern Pacific Company is without information or belief on the subject sufficient to enable it to answer the allegations of Paragraphs IV, VI and VII, or the allegations of Paragraphs II and III of the complaint in respect of fictitiously named persons or defendants, and on such ground denies each and every such allegation. Defendant Southern Pacific Company denies each and every allegation of the complaint not hereinabove admitted or denied, and denies that it, or any of its officers, agents, servants or employees was negligent in the premises, or in respect of any matter alleged in the complaint, and denies that any negligence thereof was a cause, proximate or otherwise, of said accident or of the injuries or damages, if any, alleged in the complaint.

And For a Second, Separate and Independent Answer and Defense to the complaint, and to each alleged cause of action thereof, defendant Southern Pacific Company shows as follows:

I.

Defendant here repeats and alleges all of the mat-

ters set forth in Paragraph I of the first answer and defense above, and incorporates them herein by reference the same as though fully set forth at length. Ellis P. Shanahan was negligent in these matters set forth in the complaint, and negligently drove, operated, maintained and controlled said automobile, and negligently disregarded warnings of the approach of said train, with the result that said automobile collided with said locomotive of said train. Said conduct of Ellis P. Shanahan, as aforesaid, proximately caused and contributed to said accident, and to the injuries and damages, if any, alleged in the complaint.

And for a Third, Separate and Independent Answer and Defense to the complaint, defendant Southern Pacific Company shows as follows:

I.

Defendant here repeats and alleges all of the matters set forth in paragraph 1 of the first answer and defense above, and incorporates them herein by reference the same as though fully set forth at length. Ellis P. Shanahan was negligent in those matters set forth in the complaint, and negligently drove, operated, maintained and controlled said automobile, and negligently disregarded warnings of the approach of said train, with the result that said automobile collided with the locomotive of said train. Said conduct of Ellis P. Shanahan was the sole cause, and the sole proximate cause of said

accident, and of the injuries and damages, if any, alleged in the complaint.

Wherefore, defendant Southern Pacific Company, a corporation, prays that plaintiff take nothing by her complaint on file herein; that defendant have judgment for its costs of suit incurred herein, and for such other, further, and different relief as, the premises considered, is proper.

/s/ A. B. DUNNE,

DUNNE & DUNNE,

Attorneys for Defendant

Southern Pacific Company.

Receipt of Copy acknowledged.

[Endorsed]: Filed June 15, 1949.

[Title of District Court and Cause.]

VERDICT

We, the Jury, find in favor of the Defendant.

/s/ M. J. LANNES,

Foreman.

[Endorsed]: Filed December 30, 1949.

In the Southern Division of the United States District Court for the Northern District of California

No. 28770-G

NELDA SHANAHAN,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,

Defendant.

JUDGMENT ON VERDICT

This cause having come on regularly for trial on the 19th day of December, 1949, before the Court and a Jury of twelve persons duly impaneled and sworn to try the issues joined herein; Sydney Murman, Esq., appearing as attorney for plaintiff, and Mitchell Boyd, Esq., appearing as attorney for defendant, and the trial having been proceeded with on the 19th, 21st, 22nd, 27th, 28th, 29th and 30th days of December in said year, and oral and documentary evidence on behalf of the respective parties having been introduced and closed, and the cause, after arguments by the attorneys and the instructions of the Court having been submitted to the Jury and the Jury having subsequently rendered the following verdict, which was ordered recorded, viz.: "We, the Jury, find in favor of the Defendant, M. J. Lannes, Foreman," and the Court having ordered that judgment be entered herein in accordance with said verdict and for costs;

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that plaintiff take nothing by this action, and that defendant go hereof without day, and that said defendant do have and recover of and from plaintiff its costs herein expended taxed at \$.

Dated: January 3, 1950.

/s/ C. W. CALBREATH,
Clerk.

Entered in civil docket, January 3, 1950.

[Endorsed]: Filed January 3, 1950.

[Title of District Court and Cause.]

NOTICE

To Messrs. Hadsell, Sweet, Ingalls & Murman, 405
Montgomery Street, San Francisco 4, California.

Messrs. Dunne & Dunne, 333 Montgomery
Street, San Francisco 4, California.

You Are Hereby Notified that on January 3, 1950, a Judgment on Verdict was entered of record in this office in the above-entitled case.

San Francisco, California, January 3, 1950.

C. W. CALBREATH,
Clerk, U. S. District Court.

[Title of District Court and Cause.]

MOTION FOR A NEW TRIAL

Now comes plaintiff above-named and moves this court for an order setting aside the verdict and judgment entered herein on December 30, 1949, and for a further order granting a new trial in the above-entitled cause for the following reasons:

(1) Irregularity in the proceedings of the court by which plaintiff was prevented from having a fair trial.

(2) Irregularity in the proceedings of the jury by which plaintiff was prevented from having a fair trial.

(3) Irregularity in the proceedings of the adverse party by which plaintiff was prevented from having a fair trial.

(4) Orders of the court by which plaintiff was prevented from having a fair trial.

(5) Abuse of discretion by which plaintiff was prevented from having a fair trial.

(6) Misconduct of the jury.

(7) Surprise which ordinary prudence could not have guarded against.

(8) Newly discovered evidence material to plaintiff which plaintiff could not, with reasonable diligence, have discovered and produced at the trial.

(9) Insufficiency of the evidence to justify the verdict.

(10) Errors in law occurring at the trial and excepted to by the plaintiff.

(11) Errors in the court's instructions.

(12) Verdict for the defendant is contrary to law and against the evidence.

Except where affidavits are required, said motion will be based upon all the files, records and minutes of the court in said action.

Dated: January 5, 1950.

HADSELL, SWEET, INGALLS
& MURMAN,

/s/ SYDNEY P. MURMAN,
Attorneys for Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed January 9, 1950.

District Court of the United States, Northern District of California, Southern Division

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Friday, the 28th day of April, in the year of our Lord one thousand nine hundred and fifty.

Present: The Honorable Herbert W. Erskine,
District Judge.

[Title of Cause.]

PLAINTIFF'S MOTION FOR A NEW
TRIAL DENIED

Plaintiff's motion for a new trial heretofore having been submitted to the Court for consideration and decision, now, due consideration having been had, it is Ordered that said motion be and the same is hereby denied.

[Title of District Court and Cause.]

NOTICE

To Messrs. Hadsell, Sweet, Ingalls & Murman, Attorneys, 405 Montgomery Street, San Francisco, Calif.

Messrs. Dunne, Dunne & Phelps, Attorneys, 333 Montgomery Street, San Francisco, Calif.

You Are Hereby Notified that on April 28, 1950, Judge Herbert W. Erskine denied the motion for new trial in the captioned case.

San Francisco, California, May 1, 1950.

C. W. CALBREATH,
Clerk, U. S. District Court.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO UNITED STATES
COURT OF APPEALS

Pursuant to Rule 73, R. C. P., notice is given that plaintiff appeals to the United States Court of Appeals for the Ninth Circuit from the judgment on verdict entered herein by the above-entitled court on January 3, 1950, in favor of defendant Southern Pacific Company and against plaintiff.

Dated: May 22, 1950.

/s/ DAN HADSELL,

/s/ SYDNEY P. MURMAN,

HADSELL, SWEET, INGALLS
& MURMAN,

Attorneys for Plaintiff.

[Endorsed]: Filed May 22, 1950.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men by These Presents:

That We, Nelda Shanahan, an individual, as Principal, and The Fidelity and Casualty Company of New York, a body corporate, duly Incorporated under the laws of the State of New York and authorized to act as surety under the act of Congress approved August 13, 1894, as amended by the act of Congress approved March 23, 1910, whose principal office is located in the City of New York, and authorized to act as surety in the State of California, as Surety, are held and firmly bound unto the above-named defendants in the sum of Two Hundred Fifty and No/100ths (\$250.00) Dollars, lawful money of the United States of America, to which payment well and truly to be made we bind ourselves, jointly and severally, our successors and assigns, firmly by these presents.

Sealed with our seals, signed and dated this 17th day of May, 1950.

Whereas, the above-named plaintiff, Nelda Shanahan, has petitioned for and been allowed an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from an order entered in said cause January 3, 1950;

Now, Therefore, the Condition of This Obligation is such that if the said plaintiff, Nelda Shanahan, shall prosecute its appeal to effect, and answer all costs if it fail to make its plea good, then this obli-

gation to be void; otherwise in full force and virtue.

It is expressly agreed by the surety hereto that, in case of a breach of any condition hereof, the above-entitled court may, on notice to said surety of not less than ten days, proceed summarily in the above-entitled action to ascertain the amount which said surety is bound to pay on account of such breach, and render judgment therefor against it, and award execution therefor.

NELDA SHANAHAN,

By /s/ NELDA SHANAHAN,
Principal.

THE FIDELITY AND
CASUALTY COMPANY OF
NEW YORK,

[Seal] By /s/ F. M. REIMERS,
Its Attorney,
Surety.

State of California,
City and County of San Francisco—ss.

On this 17th day of May, in the year One Thousand Nine Hundred and Fifty, before me, C. J. Treganowen, Notary Public in and for the said City and County of San Francisco, residing therein, duly commissioned and sworn, personally appeared F. M. Reimers, known to me to be the Attorney of The Fidelity and Casualty Company of New York, the Corporation that executed the within instrument, and known to me to be the person who executed the

said instrument on behalf of the Corporation therein named and acknowledged to me that such Corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal in the County of San Francisco, the day and year in this certificate first above written.

[Seal] /s/ C. J. TREGANOWEN,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission expires October 26, 1952.

[Endorsed]: Filed May 22, 1950.

In the Southern Division of the United States District Court for the Northern District of California

Before: Hon. Herbert W. Erskine,
Judge.

No. 28770

NELDA SHANAHAN,

Plaintiff,

vs.

SOUTHERN PACIFIC RAILROAD CO.,
a Corporation,

Defendant.

PARTIAL REPORTER'S TRANSCRIPT

Monday, December 19, 1949

Appearances:

SYDNEY MURMAN, ESQ.,

For the Plaintiff.

MITCHELL BOYD, ESQ.,

For the Defendant.

Mr. Boyd: If your Honor please, as I stated to Judge Goodman this morning, we are not ready to proceed to trial at this time. Mr. Dunne, who is to try this case, as I told Judge Goodman, went to trial last week in the murder case of the State Court, which will be finished Wednesday possibly. Mr. Phelps of our office is in Sacramento on a criminal

matter and we, as I told Judge Goodman, are not ready to proceed at this time with this case. I don't think jury cases are usually tried this week, either in State or Federal courts, and we are right at this time—I can proceed with the empanelling of the jury this morning. I am not familiar with the case. I spent last week myself in the State court. I don't know whether your Honor wants to proceed with the case at this time or whether——

The Court: If Judge Goodman has sent it over here to this Court to try, I am really all ready to proceed, and I think we could empanel the jury and perhaps we could be ready tomorrow or tomorrow afternoon.

Mr. Boyd: Mr. Dunne won't, your Honor. The testimony is to close today. He would possibly be ready Wednesday. He wants to try the case because he is the man in the office who is prepared in the case and ready to try it. Mr. Phelps won't be back from Sacramento until tomorrow.

Mr. Murman: If the Court please, I had no warning of the case not going forward this morning. I have five [1*] witnesses from Redding. I represent a widow, and she has been put to considerable expense to bring witnesses from Redding this morning. Mr. Boyd and myself have had some consultation about the case back in October. It will be a great expense to the plaintiff if we don't go forward.

Mr. Boyd: That is a matter of expense. That could be taken care of.

Mr. Murman: We are ready to go. We have

* Page numbering appearing at top of page of original Reporter's Transcript.

our witnesses. It has been great expense to the plaintiff to bring them here and we are prepared to go forward this morning.

The Court: You submitted all these issues to Judge Goodman already?

Mr. Boyd: I submitted them this morning, and Judge Goodman said we were to take it up with your Honor.

The Court: Would it be all right with you, Mr. Murman, to empanel the jury and continue the matter until Wednesday? How long will it take?

Mr. Boyd: It is a crossing accident case. I estimated to Judge Goodman last week when we had a discussion as to whether it should go forward this morning; it would take possibly three days at the most, if that.

The Court: That would be Wednesday, Thursday and Friday.

Mr. Boyd: Yes, it would, and could terminate by Friday.

The Court: The additional cost of witnesses, bring [2] your witnesses back for Wednesday. I can assess against the defendant.

Mr. Boyd: That would be agreeable.

Mr. Murman: That would be helpful.

The Court: We will go ahead with the selection of the jury now. There is no use bringing all these ladies and gentlemen back again; might as well only bring twelve back; go ahead with the selection of the jury and continue the matter until Wednesday morning at 9:30 and get a good start.

Mr. Boyd: It is possible three days may dispose

of it. I am inclined to doubt it. Mr. Murman has five witnesses. We have possibly twice that number of witnesses. I think maybe the matter would not be concluded before Christmas and I hate to keep the jury here.

Mr. Murman: We are ready to go this morning, and have had quite a bit of cost about the matter.

The Court: We will select the jury now and continue the jury until Wednesday, and if we can't get through by Christmas we will have to put it over until after Christmas. Call the jury.

(Thereupon, a jury was empanelled and sworn.)

The Court: I want to say in this case if there is additional cost of these witnesses returning in connection with this postponement I want the defendant to pay those costs. [3]

Mr. Boyd: We will, your Honor, no question about that. We are embarrassed that this happened. We tried to explain to Judge Goodman a couple of weeks ago this would probably happen, and with the Cooley case—we were to proceed to trial on the 12th, and then His Honor shoved the Cooley case ahead and had to change plans.

Mr. Murman: Of course, we originally asked for the 19th and Judge Goodman said he couldn't try it on the 19th, but would on the 12th; then when it couldn't go on on the 12th it was placed on the 19th.

The Court: I am sympathetic with lawyers that find themselves in those cases, that is why I gave you the order.

Mr. Murman: If I had got any notice Friday maybe we could have done something about it. [4]

Wednesday, December 21, 1949

(A jury was duly impanelled and sworn and the following proceedings were had.)

The Court: Stipulate all the jurors are present.

Mr. Murman: Yes, your Honor.

The Court: Will you stipulate that hereafter so that I don't have to repeat it?

Mr. Phelps: Certainly, unless one of us calls attention to the fact that one of the jurors is absent.

The Court: I want to say, ladies and gentlemen of the jury, I asked you to be here at 9:30 and I was here at 9:30 so that we could convene, but one of the jurors was not here and has kept us all waiting. Now, I am sorry about it, but it wasn't the fault of anybody but the one juror; and hereafter when we fix an hour or time for commencement of the session, if it is not agreeable to anyone I don't mind your asking me, but I would like to have you here at the time specified. We have lost 20 minutes in the trial of this case. Will you proceed with your opening statement?

Mr. Murman: Yes, your Honor.

Mr. Phelps: May it please the court, I am sorry to interrupt, but I was about to say I would like to request an order excluding witnesses.

The Court: All right.

Mr. Murman: May I have Mrs. Shanahan remain in the court room?

Mr. Phelps: Certainly.

The Court : All right.

Mr. Murman: Will plaintiff's witnesses—will there be a place outside the court room for them to remain?

The Crier: Yes.

(The witnesses left the court room.)

Opening Statement on Behalf of Plaintiff

Mr. Murman: If the Court please, and ladies and gentlemen of the jury, it now becomes the duty of plaintiff's attorney to outline to you ladies and gentlemen what the plaintiff expects to prove in this case. The scene of this accident is laid in the northern part of the Sacramento Valley, the little town of Anderson, a rather small hamlet between Redding and Red Bluff, about 11 miles south of Redding, I believe. The time is about a year ago, the first working day after Christmas. On that particular day the crack Southern Pacific passenger train, the Beaver, was going through the black, dark, misty morning toward San Francisco at a rate of about 70 miles an hour. The train was about half an hour late. It had gone through Redding on its way south and was due to pass through Anderson.

As the train came towards Anderson, a freight train went on the siding on the west siding of Anderson. I have here a map of the area of this accident. Perhaps this will be of some help if I talk in part from this map. To explain the map, ladies and gentlemen of the jury, we have an arrow that

points generally in a northerly direction. Of course, south is generally to the left of the map, as you look at it, north is generally to the right of the map as you look at it; west is generally to the top, and east is generally to the bottom.

As I said, this train, the Beaver, No. 13, was speeding on its way to San Francisco, and the main line track of the Southern Pacific through the town of Anderson is the center track, as shown here on this map. At the time that the train approached Anderson there was a freight train on this west siding, east and west, was stretched across the North Street crossing and Ferry Street crossing.

It was a misty morning, requiring the use of windshield wipers. It was also daylight saving time, so that the times in this case are generally one hour different from the standard time, which would be an hour earlier.

As this train approached Anderson, Mr. Shanahan arose to go to work. He was a zone deputy collector of the Internal Revenue Department. His place of business was in the vicinity of Anderson, but the main office was in Redding. He left Mrs. Shanahan somewhere around 9:30, daylight saving time, on that morning, normally 6:30. He came from his home in the general direction of East Center Street, with the intention, apparently, of crossing the tracks to West Center Street, which is Highway 99, to go north to Redding. Beyond that we don't know much about what Mr. Shanahan did that morning. We shall show by other witnesses, since Mr. Shanahan was killed, that Mr. [4] Shana-

han was killed, that Mr. Shanahan was seen right at the vicinity of the Southern Pacific depot, just about opposite Howard Street. At that time he was driving a Plymouth coupe automobile—I believe it was a Plymouth—and he was seen to turn and go in the direction of the Howard Street crossing.

We shall show that as he approached the crossing he slowed down and came to a stop just about at the point where the railroad right-of-way line crosses the Center Street crossing area. We shall show that he was seen at that point to wipe the inside of his windshield, it being a cold, misty morning; apparently some steam had gotten on them, and that he remained stopped there for about a minute or so; that this was about a quarter of eight, daylight saving time, normally a quarter of seven. After remaining stopped there and going through the motion of wiping his windshield, he slowly went forward over the crossing. We will show as he got on the east track there suddenly appeared a light beam, and as he went a little bit further, that is, as he went from the east track to the west track and was on the west track—that is, the main-line track—there was a whistle blown, and that a train hit the car and it was thrown 40 feet down the right-of-way and demolished, and Mr. Shanahan was thrown 120 feet down the right-of-way and killed instantly.

Ladies and gentlemen, we shall show that there is a wig-wag at this point where I am about placing the pointer, [5] an ordinary wig-wag signal, and

that the witnesses who saw Mr. Shanahan at the time, as I have just outlined to you, did not see a wig-wag in operation. We shall show that there is a double flash signal up at this intersection which was in operation. It is a signal that had two red flashing lights that flash alternately; however, that it could not be used because the freight train was across the track. We shall show from the point Mr. Shanahan stopped and wiped his windshield that the visibility of the track is impaired by the depot. In other words, although he stopped up at the main track and apparently looked and listened, he could not see far enough up the main track to see up in the area to the north part of town.

Now, we shall show that Mr. Shanahan, as I said, was a deputy zone collector of the Internal Revenue Department and that he was earning approximately \$4100 a year. We shall show that Mr. Shanahan had been married for many years and that Mrs. Shanahan was dependant upon him for her support. We shall show that at the time he was killed he was earning the amount which I have stated to you, and that his life expectancy was approximately 18 years had he lived; that he was about at that time 55 years of age. We shall show that Mrs. Shanahan is of the age of 43 and that her life expectancy was longer than his, of course. We shall show that, by virtue of his death, under the circumstances, the circumstances which I have mentioned here, 'the wig-wag signal was not operating and [6] he came to a stop and apparently looked and listened as he would be required to do in the use of ordinary care.

We shall show you that Mr. Shanahan was deprived of his earnings for that period, which would approximately be \$76,000 had he lived out his life. In that connection we shall show you he had a civil service rating with the United States Government and that he normally would have been employed throughout the balance of his life expectancy, up to the age of 70, at least, at which time, as any Federal employee is required, he would retire and take a pension. However, he had some 15 years ahead of him before he would have reached that age.

Having shown you those facts, ladies and gentlemen, we will ask you of course to bring in a verdict for the plaintiff in the amount of damages which she is claiming, namely, \$75,000.

This is a wrongful death action and it is incumbent upon the plaintiff—we will shoulder the burden of proof to show, first of all, that the defendant here was negligent in the operation of its train, and the crossing signal was not operating at the time; furthermore, that by virtue of Mr. Shanahan's death, Mrs. Shanahan has suffered pecuniary loss, not only from earnings but from the loss of companionship and his living with her for the balance of their lives. That, ladies and gentlemen, is briefly what the plaintiff expects to prove in this case. [7]

The Court: Do you want to make an opening statement now?

Mr. Phelps: If the court please, I should like to reserve my opening statement until the close of the plaintiff's case. Apparently—you recall the jury was selected when I was not here, but I presume the

court advised the jury that in the ordinary procedure plaintiff puts on his case first, then the defendant puts on his case. I would like to reserve my opening statement until that time. Thank you.

Mr. Murman: If the court please, a Mr. Wickfield has come into the courtroom. I do not intend to use him as a witness on plaintiff's case. I was conferring with Mr. Phelps as to whether he could remain. Mr. Phelps has no objection to his remaining in the court room, if the court please.

Mr. Phelps: That is right, your Honor.

Mr. Murman: Plaintiff will call Mr. Hendrix.

TOMMY A. HENDRIX

a witness called on behalf of the plaintiff, sworn.

The Clerk: State your name to the court and jury, please. A. Tommy A. Hendrix.

Direct Examination

By Mr. Murman:

Q. You have appeared here, have you, in response to a subpoena which has been issued by the plaintiff? A. Yes. [8]

Q. Where do you live, Mr. Hendrix?

A. I Anderson, California.

Q. How long have you lived in Anderson?

A. Since 1945.

Q. Prior to that did you live somewhere else?

A. I was in the service.

Q. What is your business?

A. Lumber grader.

(Testimony of Tommy A. Hendrix.)

Q. Where are you employed?

A. Fir and Pine Planing Mill.

Q. Where is that? A. In South Redding.

Q. Where is Redding in connection with Anderson?

A. About 11 miles north of Anderson.

Q. You had to go from Anderson to Redding to work, is that right? A. That is right.

Q. Did you know Mr. Shanahan, the husband of the plaintiff in this case? A. Yes, I did.

Q. How long had you known him prior to his death?

A. I knowed him since the latter part of 1945.

Q. About how old would you say he was?

A. I would say he was between 45 and 50.

Q. Did he seem to be in apparent good health? A. Yes.

Mr. Phelps: I object to that, calling for a conclusion of the witness. You can possibly get that some other way. This witness, what does he know about it?

Mr. Murman: Well, he knew him five years. I think he is competent to testify how he appeared, your Honor.

The Court: Yes, I think so.

Q. (By Mr. Murman): Will you answer the question, Mr. Hendrix? A. Pardon?

Q. Will you answer the question? Was he in apparently good health?

A. Yes, he seemed to be in very good health.

Q. When did you last see him before his death?

(Testimony of Tommy A. Hendrix.)

A. It was about a week before. It was the week before he was killed, on a Saturday. We were out at a pinochle party——

Q. Never mind where you were at, but you saw him at that occasion? A. Yes.

Q. At that time he was in apparently good health? A. Yes.

Q. Do you recall December 27, 1948?

A. Yes, sir.

Q. Where were you on the morning of that day?

A. I was going to work.

Q. Where were you before you left for work? [10] A. At home.

Q. About what time did you leave your home?

A. About 7:30.

Q. Was that standard time or daylight saving time? A. Daylight saving time.

Q. Normally it would be an hour early, is that correct? A. That is right.

Q. Was it dark at the time you left home?

A. Yes, it was dark.

Q. How did you leave your home, in an automobile or how? A. In my own automobile.

Q. Which side of the railroad tracks was your home on, was your home located on at that time?

A. It would be on the east side of the railroad tracks.

Q. So that how did you go from Anderson to Redding? A. On Highway 99.

Q. Which side is Highway 99 on?

(Testimony of Tommy A. Hendrix.)

A. The west side.

Q. So you had to cross the track?

A. That is right.

Q. As a matter of fact, when you left home in the dark at about 7:30 of that morning, how was the weather?

A. It was dark, it was misty.

Q. When you say misty, what do you mean?

A. Kind of stormy. [11]

Q. Did you have to use your windshield wiper?

A. Yes, I did.

Q. Was it cold?

A. Well, it was cold enough I had my defroster going on the inside of the car to keep it from steaming up.

Q. Coming from home at what part of Center Street do you cross the tracks?

A. I went up Howard Street to North Street and was going to cross the railroad tracks at North Street.

Q. Do you mean by that you came up Howard Street to Center Street and went north on Center Street to North Street?

A. That is right, up to the North Street crossing.

Q. What did you see there?

A. As I started north there on to the crossing there was a railroad train along there blocking—it was blocked by a freight train.

Q. Where was the freight train with respect to the track? By the way, how many tracks are there at the North Street crossing?

(Testimony of Tommy A. Hendrix.)

A. There are three there.

Q. Three? Where was the freight train with respect to those tracks?

A. Sitting on the far west track.

Q. How did you see the freight train?

A. I pulled up to the crossing there and my headlights shone [12] on the train.

Q. Had you seen it before your headlights lighted up the train?

A. No, but I had seen the bell signal.

Mr. Phelps: I object to that and ask that remark go out as not responsive.

Mr. Murman: I have no objection.

The Court: All right, the part that says, "I had seen the bell signal," that may go out.

Q. (By Mr. Murman): You say you pulled up to the North Street crossing and your headlights lighted up the freight train?

A. That is right.

Q. That was the first time you had seen the freight train? A. Yes.

Q. Did you see anything else at that crossing as you pulled up there?

Mr. Phelps: Objected to as incompetent, irrelevant, and immaterial, what else was seen at that crossing. It isn't the crossing where the accident occurred. Nothing to do with this.

The Witness: I seen the signal working there.

Mr. Murman: When you say "the signal," you mean something along the crossing there?

(Testimony of Tommy A. Hendrix.)

A. Yes, there is a bell signal there.

Q. How could you see it? [13]

A. There is a red light flashes off and on.

Q. After you saw that signal and saw the freight train, what did you do?

A. I turned around on North Street and north on Center Street and came back down to Ferry Street.

Q. That is the next street south of North Street, is that right? A. That is right.

Q. What did you do that for?

A. I was going straight across there, but it was also blocked so I went down——

Q. Just a moment. What was it blocked by?

A. By the freight train.

Q. Could you see it from Center Street?

A. Yes. There were some cars on the main highway along there, the lights of cars, you could see the lights from them underneath it.

Q. You mean the freight train was in front of the lights, is that it?

A. No, just as the cars went by you could see the reflection of the lights from the cars going by.

Q. On the other side of the freight train?

A. That is right.

Q. Then what did you do?

A. I went on down Center Street to the Howard Street crossing. [14]

Q. That is the next street south of Ferry Street, is that correct? A. That is right.

(Testimony of Tommy A. Hendrix.)

Q. What did you do at the Howard Street crossing?

A. I went across Howard Street crossing and then I stopped at the foot of the incline and looked to see if the signal was working, and it wasn't.

Mr. Phelps: I object to this, no foundation, incompetent, irrelevant and immaterial, not down to the time and place of the accident, has nothing to do with this accident. This matter comes before, not related to the particular issue, nothing to do with it.

Mr. Murman: You understand, Mr. Phelps, this was about 10 or 15 minutes before the accident occurred.

Mr. Phelps: You would develop it from your witness. That is one of the points of my objection.

The Court: Will you show about the time the accident occurred?

Mr. Murman: Yes, your Honor, not by this witness but another witness.

The Court: Show now when the accident occurred.

Mr. Murman: About a quarter to eight.

The Court: This is 7:30?

Mr. Murman: A little after 7:30. As I understand it the witness left his home at 7:30 and this was after he had [15] left home.

Q. Is that correct? A. That is right.

Q. About what time would you judge you got to the crossing?

A. I would say around 7:37.

(Testimony of Tommy A. Hendrix.)

Mr. Phelps: So we will understand my point in my objection I want to inquire, Mr. Murman I think stated that this was about 10 or 15 minutes before the accident?

Mr. Murman: Even closer to the time of the accident. The witness says it was 7:37 when he was there, and this accident happened at 7:45, approximately, which would be just eight minutes later.

Mr. Phelps: I think 7:47 is the time of the accident, but it is, at any rate, 10 minutes before this.

Mr. Murman: All right, not over 10 minutes.

Mr. Phelps: My objection still stands, if your Honor please, as being remote and having nothing to do with the accident, and I ask that all this testimony go out.

The Court: Overruled. Go ahead.

Q. (By Mr. Murman): You say you crossed the Howard Street crossing and noticed that the signal wasn't working?

Mr. Phelps: Objected to as leading and suggestive.

Mr. Murman: He had already testified to that.

Mr. Phelps. I am not making the objection not for the purpose of this question, but to continue that objection so [16] that you will frame your questions so they are not leading.

Mr. Murman: I will try to do that, Mr. Phelps.

Q. (By Mr. Murman): After you got across the crossing, what did you do, Mr. Hendrix?

A. I turned north on Highway 99, which is Center Street, east, and went towards Redding.

(Testimony of Tommy A. Hendrix.)

Q. At that time was it still dark? A. Yes.

Q. Was it still misty? A. Yes.

Q. Were you still using your windshield wiper?

A. That is right.

Q. What did you do, continue north toward Redding? A. I went north on up to Redding.

Q. You have *many* that trip many, many times, have you? A. That is right.

Q. Does the highway follow the railroad track?

A. It does, yes, all the way in to Redding.

Q. At that time after you left Anderson and went north to Redding, did you see a train at that time?

A. Yes, I met a passenger train about five miles south.

Q. Going which direction?

A. About five miles south of Redding, coming south.

Q. Towards Anderson? A. Yes. [17]

Q. You stated that as you went across Howard Street crossing the signal was not seen to be operating. Did you see any flagmen anywhere?

A. No.

Q. Mr. Hendrix, I show you four photographs and ask you to look at them and tell me if you can what they are pictures of.

A. This is a picture of Anderson, part of Anderson here.

Q. What part of Anderson?

(Testimony of Tommy A. Hendrix.)

A. Taken just this side—the south end of the depot.

Q. South end of the depot?

A. This is a picture——

Q. Before we get to the next picture, in which direction is the camera pointed?

A. Kind of towards the northwest.

Q. So this would be south and would be using the camera pointed towards the northwest?

A. That is right.

Mr. Murman: I will ask that this be marked for identification, if the court please, as plaintiff's exhibit next in order.

(Whereupon photograph of Anderson was marked Plaintiff's Exhibit No. 3 for identification.)

The Witness: This is a picture of West Center Street from the south.

Q. (By Mr. Murman): So that the camera points in the same [18] general direction, too?

A. Yes.

Q. But it is further from the depot, is that correct? A. That is right.

Mr. Murman: I will ask this be marked plaintiff's exhibit next in order.

(Photograph of Anderson referred to was thereupon marked Plaintiff's Exhibit No. 4 for identification.)

A. This is a picture of the depot and the Howard

(Testimony of Tommy A. Hendrix.)

Street crossing from the—it would be from the south—from the west to the north, kind of north-east.

Q. In other words, the camera was pointed to the northeast, but it is still south of the depot?

A. That is right.

Q. On which side of the railroad tracks was the camera placed?

A. It would be on the west side.

Mr. Murman: I will ask this be marked for identification plaintiff's exhibit next in order.

(Photograph referred to was thereupon marked Plaintiff's Exhibit No. 5 for identification.)

A. This picture is another picture of the south end of the depot pointing towards the south—the northwest.

Mr. Murman: I ask this be marked plaintiff's exhibit next in order, for identification.

(Photograph referred to was thereupon marked Plaintiff's Exhibit No. 6 for identification.)

Q. (By Mr. Murman): Referring to these four photographs you identified, can you state, Mr. Hendrix, whether or not those pictures show the conditions of that area about the time of the accident in daylight? A. Yes.

Q. Of course at the time you were there it was dark?

(Testimony of Tommy A. Hendrix.)

A. Yes, at the time I was there it was dark.

Mr. Murman: You may cross examine.

Cross Examination

By Mr. Phelps:

May I see those pictures, please?

Q. Mr. Hendrix, I am going to—looking at these photographs that you have identified, I notice that they are all taken at such an angle that you can't see directly down the tracks to show the view a person has down the tracks. May I ask you this, is it not a fact that the tracks there north of Anderson are perfectly straight? A. They are.

Q. Yes. And they continue on perfectly straight for as far as the eye can see?

A. That is right.

Q. And once a person has passed the line of the station indicated on this diagram, the driver of a car using that crossing can see all the way down the tracks? A. Yes. [20]

Q. There is nothing, no obstruction to his view. Now, then, these pictures—I will show you plaintiff's exhibit 3 for identification—can you tell us where that was taken from, or do you know? If you don't know, say so.

A. Approximately it is taken about here, just this side, to the west side of the stop sign.

Q. Yet the stop sign is not shown there.

A. That is right, but you can see the shadow of the telephone pole and the cross wire.

(Testimony of Tommy A. Hendrix.)

Q. Taken a little bit off the road, was it not?

A. No, that would be just about where the road stops.

Q. Now then, Mr. Hendrix, on this morning as you drove to work, you say it was about 11 miles to your place of work?

A. That is right.

Q. As you got up first it was dark, of course?

A. That is right.

Q. You don't remember what time the sun rose that morning, do you?

A. No, I don't.

Q. You are not purporting to testify, Mr. Hendrix, or represent to us what the conditions were as to visibility as of the time of this accident?

A. No.

Q. You were just telling us what you saw as of the time you went down? [21]

A. That is right.

Q. You left your home about 7:30?

A. Yes.

Q. And after leaving your home you didn't make any stops before coming to the railroad train up on North Street?

A. I stopped at Howard Street.

Q. Well, let me ask you this: Where is your home within the town of Anderson?

A. On Howard, West Howard—on East Howard.

Q. About how many blocks?

A. It is at the end of the fourth block.

Q. So that you were about four blocks away from Center Street?

A. That is right.

Q. And you left your home at 7:30 and contin-

(Testimony of Tommy A. Hendrix.)

ued straight on down to Center Street, turned to your right on Center Street?

A. That is right.

Q. Then went down to the North Street?

A. That is right.

Q. Without any delay or any stops?

A. Well, if you have ever started a car in the morning on a cold morning up in that country, you know you usually let it run a few minutes.

Q. Well, I have started a car on a cold morning, but we are not concerned, Mr. Hendrix, with what the weather does. I am trying to find out your memory of this particular morning. [22]

A. Yes.

Q. That is the only thing that is in question here, this morning. Do you know what you did?

A. I let my car idle every morning before I take it out.

Q. Do you remember that? A. Yes.

Q. For about a minute?

A. Well, I usually give her a few minutes. I wouldn't say just how long.

Q. Now, after having let it run, at any rate you did—coming back to my question—you did continue on without stopping, at normal rate?

A. That is right.

Q. Not speeding, but not going slowly?

A. That is right.

Q. 20 or 30 miles an hour?

A. No, you don't drive 20 or 30 miles an hour in Anderson.

(Testimony of Tommy A. Hendrix.)

Q. Well, you were driving a reasonable rate?

A. That is right, a reasonable rate.

Q. I am trying to find out, Mr. Hendrix, what you were doing, what you did, how you did it. Now, you went on down this street and came down to Center Street. You didn't stop. The train was on the track and you turned and came back——

A. No, I didn't go back.

Q. You didn't stop? [23]

A. No, I didn't stop because I saw the train.

Q. You went down to Ferry Street, saw that the freight train was still blocking the crossing, then you came down to—what is the name of that street?

A. That is Howard Street, the Howard Street crossing.

Q. That is Howard Street? Then did you continue to cross Howard Street and on your way to work?

A. That is right.

Q. Now then, the train, the freight train that you saw was on the west track, is that right?

A. That is right.

Q. So that we may understand it, let's mark that track so that there will be no question about it.

Q. Do you want the witness to mark it, Mr. Phelps?

Mr. Phelps: Yes, if you will. Will you step to the board and mark that passing track or west track where the freight train was?

(The witness left the stand and went to the blackboard.)

Mr. Phelps: You have got a "W. T." and I will

(Testimony of Tommy A. Hendrix.)

put a circle around there and mark that "H-1," and I am pointing an arrow from W. T. to this train. That is the passenger train, is that correct?

A. Yes.

Q. That is the track the freight train was on?

A. Yes, that is right. [24]

Mr. Phelps: I have indicated that by "passing track." All right.

(Witness resumed the stand.)

Q. (By Mr. Phelps): As you went down there that morning that was the only train you saw there, is that right? A. That's right.

Q. You didn't see any other train at all that morning? A. Yes.

Q. Other than the passenger train you told us about five miles from Redding?

A. That is right.

Q. I understand that, but I am now referring to the time when you were going in and around Anderson, where you were making your circuit from home down to Center Street and North Street and back to Howard and across?

A. That is right.

Q. The only train you saw during that time was this freight train there on the siding on the west track? A. That is right.

Q. Now, did you make any observation as to how long that train was?

A. No, I wouldn't say, but the train was just about across the Ferry Street crossing.

(Testimony of Tommy A. Hendrix.)

Q. Just about across the Ferry Street crossing? Which way across, north or south? [25]

A. It would be on the south side, south end.

Q. That would be just about the south, towards Red Bluff?

A. It would be just about to where I put the "W.T."

Q. Let's mark that. Well, that is sufficiently clear, I think. Just where you have marked the "W.T."

A. Yes, there were two cars over the crossing there.

Q. Which way was the train headed, do you know?

A. The engine was headed north.

Q. So that the rear of the train was at the point "W.T."?

A. That is right.

Q. Caboose?

A. Caboose and a car.

Q. As you continued on you didn't have occasion to note anything in regard to the length of the train?

A. No, I never paid any attention.

Q. You were using your defroster?

A. Yes.

Q. It was cold and had a tendency to mist up on the inside, steam up?

A. That is right, steam up.

Q. And you found it necessary to use that?

A. Yes.

Q. And you did use it. You then didn't find it necessary to wipe your windshield with your hand?

A. That is right. [26]

(Testimony of Tommy A. Hendrix.)

Q. You had a mechanical device to do that?

A. Yes.

Q. I take it you were to work on time that morning?

A. Yes, sir.

Q. You have a clear recollection of this passenger train about five miles south of Redding?

A. Yes.

Q. Do you remember that?

A. Yes.

Q. This is not something you are reconstructing?

A. No, sir.

Q. You are sure you remember that?

A. Because I usually don't meet that train in the morning.

Q. I am just trying to find out whether you have an independent recollection of that.

A. That is right.

Q. All right, now, of course you didn't know anything about that accident until later, I take it, that night?

A. That is right.

Q. And when were you first approached by anyone and learned you were going to testify in this case?

A. I was approached by Mr. Wickfield. He came and asked me for my testimony.

Q. About how long after the accident?

A. I would say about two or three days after the accident. [27]

Q. All right, now, there is just one more thing, if I may. Now, Mr. Hendrix, of these three tracks we haven't identified this center track or the track

(Testimony of Tommy A. Hendrix.)

here for trains proceeding north and south, is that correct? A. That is the main line.

Q. The main line? That is the one where the trains come through on? A. Yes.

Q. The other one you have already said is a passing track, and what is this third track down here? A. That is another siding.

Q. When you went over the crossing—we have already covered this, but I want to make sure—you didn't see any other train other than the train you have told us about? A. That is right.

Q. Were there other cars on any of the other tracks? A. Not that I remember.

Q. I show you a photograph——

Mr. Phelps: I ask that it be marked as defendant's exhibit for identification next in order.

(Photograph was thereupon marked Defendant's Exhibit A for identification.)

Mr. Murman: Probably you should show it to the witness first to be sure it is a photograph in the case.

Mr. Phelps: I am sure it is, but I want it identified so [28] that I can and the record will be clear.

Q. (By Mr. Phelps): I show you a photograph which has been marked by the clerk defendant's exhibit A for identification and ask you if you can identify that and tell us what it is.

A. This is a picture of Anderson at the Howard

(Testimony of Tommy A. Hendrix.)

Street crossing, the Anderson depot, taken straight down the tracks at the south end of Anderson.

Q. And looking in the direction from which the locomotive—well, you don't know about the accident.

Mr. Murman: Looking north.

Mr. Phelps: Looking in the direction of Redding? A. That is right.

Mr. Murman: For the purpose of the record, that would be looking north, generally north, is that right, Mr. Phelps?

Mr. Phelps: Yes. I think we can agree on that, if you want to.

Mr. Murman: Yes. We have been using north and south.

Mr. Phelps: I think we should, because the compass is off and why don't we just say "north and south generally" here?

Mr. Murman: That is what I outlined in my opening statement, generally north to the right, south to the left, west to the top and east to the bottom.

Mr. Phelps: Railroad men always use "east and west." There is no "north and south." Everything from San [29] Francisco is east and everything toward San Francisco is west, so that when railroad men testify there may be—they may use that designation, but it isn't a geographical designation, but except for that anyone using those terms, we can agree on that, if the court please.

Q. (By Mr. Phelps): Now, this is looking di-

(Testimony of Tommy A. Hendrix.)

rectly down the track. That is directly down the track, the main line, is that right?

A. That is right.

Q. You can identify that as the main line?

A. Yes.

Q. Does this show substantially the conditions at the time of the accident, on the day of the accident?

Mr. Murman: In the daylight.

A. In the daylight, of course.

Mr. Phelps: Certainly. He wasn't there at the time of the accident. I asked him on the day of the accident. All right, we will offer that in evidence as defendant's exhibit next in order.

Mr. Murman: I have no objection to it going into evidence. I suppose you have no objection to those I presented.

Mr. Phelps: No.

Mr. Murman: Might as well put them all in evidence, then. [30]

The Court: Admitted.

(Plaintiff's Exhibit 3, 4 5 and 6, and Defendant's Exhibit A, formerly for identification, were admitted into evidence.)

Mr. Murman: Possibly at this time, if the court please, they should be displayed to the jury. So far I haven't shown them to the jury.

Mr. Phelps: I think that may be an excellent idea so they will have the locale right now at the outset.

The Court: Very well.

(Testimony of Tommy A. Hendrix.)

(Exhibits were handed to the jury.)

Mr. Phelps: Mr. Hendrix, while we have the pictures and the jury is looking at them I want to show you one more picture and ask you if you can identify that, and I will ask the clerk to mark it for identification before I hand it to you.

(Photograph referred to was marked Defendant's Exhibit B for identification.)

Mr. Phelps: I am going to show you defendant's exhibit B for identification——

May I approach the witness, your Honor?

The Court: Yes.

Q. (By Mr. Phelps): Mr. Hendrix, I want to show you that picture and call your attention that there is a train there on the siding and another train there. Now, without referring to [31] those because the location of those are not what I am concerned about, what does that show—can you tell us whether or not that picture, without reference to the trains, does that show the general view of the scene of the accident and a view down the tracks from the lead track?

A. I couldn't say because I never seen these.

Q. I understand that. [31A]

Q. I say, on the day of the accident and in daylight, does that picture show the view down the track taken at or near the lead track east of the main——

Mr. Murman: I will object to this, if the court

(Testimony of Tommy A. Hendrix.)

please, I think the photograph shows the physical situation which is not the same as the physical situation at the time of the accident. If Mr. Phelps wants to use it for purposes of illustration, if that illustrates generally the condition in that area on the day of the accident, I have no objection to that, but to say that is a photograph of the condition as it existed on the day of the accident is not a correct statement, as far as I can see.

Mr. Phelps: I think I was clear, your Honor.

The Court: The witness, I think, knows what you mean.

A. This picture, you could see if you pulled up on to the siding on the track.

Q. (By Mr. Phelps): And looked down?

A. On the side but not opposite the stop sign.

Q. I didn't ask you that.

Mr. Phelps: I will ask that last go out, if your Honor please, as not responsive, if your Honor please, volunteer statement.

Mr. Murman: It describes the picture, if the court please. Mr. Phelps was asking——

The Court: We will strike out "opposite." [32]

Mr. Phelps: I have no objection what he says as to any particular place.

Q. So that we are perfectly clear then, it does show the view north down the track from a point a little east of the first track you come to on Howard Street? Look at the picture again and tell me whether you think it does; if you don't think so—

(Testimony of Tommy A. Hendrix.)

A. The picture shows it when you are on the siding track there at Anderson.

Q. You don't think that shows it just a little east of the siding?

Mr. Murman: That is argumentative.

Mr. Phelps: I am asking it.

Mr. Murman: He told you what it shows according to his understanding of it. You are arguing with him, now.

The Witness: But it shows where the—where, you would see it all right if you were up on the siding.

Q. (By Mr. Phelps): All right, and the siding we are referring to is the east siding, not the west siding? A. That's right.

Q. I ask that this picture be introduced in evidence and shown to the jury.

Mr. Murman: I will object to it unless for the limited purpose of illustration.

Mr. Phelps: The picture is for the purpose [33] of illustration, if your Honor please, general purpose of illustration.

The Court: I will admit it.

The Clerk: Defendant's B in evidence.

(Whereupon photograph referred to was marked Defendant's Exhibit B in evidence.)

Mr. Phelps: And I might state so there is no question, if your Honor please, the picture I have just exhibited does show two trains. It is no rep-

(Testimony of Tommy A. Hendrix.)

resentation that that was the condition at the time of the accident.

The Court: I think that is generally understood.

Mr. Murman: Yes, I think so.

The Court: In other words, ladies and gentlemen, there are two trains in this picture but they are to be considered by you as if they weren't there.

Mr. Murman: You want to display that?

Mr. Phelps: Yes, if I may.

Mr. Phelps: I have no other questions of this witness.

Mr. Murman: Your Honor, do you have any objection to my asking two questions while the jury is looking at the picture?

Redirect Examination

By Mr. Murman:

Q. When you talk about plaintiff's exhibit No. 3, Mr. Hendrix, I believe you told Mr. Phelps, it was about where you would stop, as to what crossing would that be, [34] about where you stop?

Mr. Phelps: I object to that, as incompetent, irrelevant and immaterial, calling for this opinion and conclusion as to where he did stop doesn't make any difference.

Mr. Murman: My question as to what crossing——

Mr. Phelps: My objection is the form of the question, including about where one would; ask about what it shows.

(Testimony of Tommy A. Hendrix.)

The Court: Overrule the objection. He is only asking where you would stop. You understand the question?

The Witness: Yes. This is a picture that you would see if you stopped at the stop sign at Anderson and Howard Street crossing.

Q. (By Mr. Murman): That is the crossing you went over on that morning?

A. Yes, sir.

Q. By the way, you said you came out Howard Street and went north to—why didn't you go by way of Howard?

A. Because the North Street has a better crossing and has a better signal, and you have a better view.

Mr. Phelps: I will object to that as incompetent, irrelevant and immaterial, ask that the objection precede the answer and the answer go out, what this witness would have done.

The Court: Overruled.

Q. (By Mr. Murman): Now, when you saw the passenger train, [35] as you went north to Redding, was it still dark at that time? A. Yes.

Q. Was it still misty? A. Yes.

Mr. Murman: I have no further questions.

Recross-Examination

By Mr. Phelps:

Q. When you saw the passenger train, did it have its headlight on? A. Yes.

(Testimony of Tommy A. Hendrix.)

Q. And have one of those oscillating headlights on also? A. Not that I remember.

Q. You don't remember one way or the other; could have, could it?

A. It could have an oscillating light.

Q. As well as the regular headlight?

A. Yes.

Q. And they were burning?

A. The headlight was burning.

Mr. Phelps: No further questions.

Redirect Examination

By Mr. Murman:

Q. The only thing you recall seeing was a headlight? A. That is right.

Mr. Phelps: I object to that as leading, if your Honor please. [36]

The Court: It is already answered.

Mr. Murman: I have no further questions. May the witness be excused, your Honor?

Mr. Phelps: Certainly.

The Court: All right.

Mr. Murman: Thank you, Mr. Hendrix.

(Witness excused.)

Mr. Murman: Call Mr. Hewes, please.

RAYMOND ARNOLD HEWES

called as a witness on behalf of the plaintiff, sworn.

The Clerk: Will you state your full name to the court and jury, please?

A. Raymond Arnold Hewes.

Direct Examination

By Mr. Murman:

Q. Mr. Hewes, you have come to court here pursuant to a subpoena issued by the plaintiff, have you? A. Yes.

Q. Where do you reside?

A. Redding, California.

Q. How long have you lived in Redding?

A. Off and on about 15 years.

Q. What is your business?

A. I'm a farmer.

Q. And have you always been a farmer? [37]

A. Well, most of my life; I have worked in lumber mills.

Q. That is up around the vicinity of Redding, is that correct? A. Yes.

Q. Now, did you know Mr. Shanahan before his death? A. No.

Q. Did you know Mrs. Shanahan before Mr. Shanahan's death?

A. I have just heard of them, that is all.

Q. You didn't know them personally?

A. No.

Q. You remember an accident occurred at Anderson about a year ago? A. Yes.

(Testimony of Raymond Arnold Hewes.)

Q. Do you remember the date?

A. It was December 27.

Q. That was the first working day after Christmas, was it? A. I believe it was.

Q. Now, on that day where did you live in relation to Anderson?

A. On that day I was living about 6 miles east of Redding.

Q. East of Redding?

A. East of Redding, yes.

Q. And was that out on the farm?

A. Yes.

Q. Did you have occasion to go into Anderson that morning? A. Yes, I was going to work.

Q. Where were you working on that occasion?

A. Down at Anderson, about 3 miles east of Anderson, the Arrowhead Lumber Company.

Q. About what time of the morning did you get up on the day we have been talking about?

A. I got up about 7:30.

Q. That was daylight saving time?

A. Yes.

Q. —or standard time?

A. Daylight saving time.

Q. Ordinarily be an hour—was it dark at the time you got up? A. Yes.

Q. What time after you got up did you leave home? A. Left home about 8:15.

Q. 8:15? A. To go to work, yes.

Q. You are sure it was after 8:00?

A. I usually leave about 8:15 to go to work.

(Testimony of Raymond Arnold Hewes.)

Q. Did you leave by yourself, or were you with somebody?

A. No, my brother-in-law was with me.

Q. What is his name? A. John DeRosa.

Q. Did you go in an automobile?

A. Yes, my automobile.

Q. And where did you go; did you go to Anderson? [39]

A. Went directly to Anderson to the job.

Q. Did you, in going to the Arrow Mill Company, I think you said—— A. Arrowhead.

Q. Arrowhead, did you have to cross the railroad tracks? A. Yes.

Q. And where did you intend to cross the railroad tracks?

A. Well, usually cross at the north crossing.

Q. In Anderson? A. In Anderson, yes.

Q. Did you go to the north crossing that morning?

A. Yes, it was right on our way, goes right straight out to the highway.

Q. Now, when you got to the north crossing, tell us what, if anything, you saw there?

A. Well, when I reached the north crossing, why, there was a light shining on the track, and seen a freight train cross the track.

Q. Was it dark at that time? A. Yes.

Q. And how was the weather?

A. It was—well, I guess it was misty, or fog.

Q. Did you use your windshield wiper?

A. Yes, all the way down.

(Testimony of Raymond Arnold Hewes.)

Q. Had your lights on on the car? [40]

A. Yes.

Q. You saw the freight train with your lights, is that right? A. Yes.

Q. Then what did you do?

A. Well, couldn't get across. I went down on to Center Street, the next crossing seen it was blocked.

Q. The next crossing. *What* would be the next crossing, south of the north crossing? A. Yes.

Q. What did you see?

A. It was blocked, the cars—and there was a boxcar on the crossing and so I had to go on down.

Q. Could you see the boxcar yourself?

A. Yes.

Q. How was it lighted; you said it was dark, didn't you?

A. Yes. The lights from this side of the street.

Q. You mean on the east side?

A. East side of the street and lights you could see—you could see the outline.

Q. You could see the outline of it?

A. Yes, sir.

Q. Then what did you do?

A. Well, we went on down to the Howard Street crossing.

Q. Now, before you got to the Howard Street crossing, did anything happen in connection with your driving? [41]

A. Only thing, a car pulled out in front of us.

Q. A car pulled out in front of you?

(Testimony of Raymond Arnold Hewes.)

A. Yes.

Q. Where did the car come from?

A. Out of Howard Street crossing.

Q. What kind of a car was it?

A. It was coupe.

Q. When you say "coupe," you mean a two-door type body? A. Two-door sedan, yes.

Q. Will you come down here?

(Witness went to blackboard.)

Q. Will you mark on the map—by the way, you understand this map? This is generally north to the right, generally south to the left, west to the top and east to the bottom and has been marked already, North and Howard, the depot, and this that I am pointing to now, the three parallel lines, six parallel lines, represents the railroad tracks. Do you understand that? A. Yes.

Q. Now, will you mark about where you first noticed this coupe you mentioned?

A. Well, I believe it was right about in here (indicating).

Q. Put a mark there, will you? The witness has placed an X—I will darken it a bit, and with your permission I will draw a line to the margin and mark it—what shall we use up here—[42] guess we will have to use this letter, a different letter—

Mr. Phelps: What is your first name?

The Witness: Raymond.

Mr. Phelps: Make it R.H.

Mr. Murman: R.H.—1.

(Testimony of Raymond Arnold Hewes.)

Q. Now, Mr. Hewes, where was your car when you saw this coupe at R.H.—1?

A. I believe right about in here (indicating).

Q. Will you mark that, please? The second X, if the court please, we will call R.H.—2.

Now, what happened, Mr. Hewes, after you saw this coupe in front of your car? I understood you to say you were going south? A. That's right.

Q. Was the coupe going south also?

A. Yes, sir.

Q. What happened after you saw the coupe in front?

A. Well, I pulled up behind him and he started to go up to the tracks, to the crossing there.

Q. Have any idea about what speed he was going?

A. No, he wasn't going fast, he was almost to the crossing.

Q. I see. Speak up loud enough so the reporter can hear you.

You say you pulled up behind him and went up to the crossing? A. That's right. [43]

Q. Did he stop at the crossing? A. Yes.

Q. Will you mark about where you remember him stopping, having in mind that these two parallel lines are supposed to represent the outlines of the crossing. A. Right about in here, about.

Q. All right, right about there (indicating). You placed another "X" at the point where the black line intersects the parallel lines of the crossing, is that right? We will mark that R.H.—3.

(Testimony of Raymond Arnold Hewes.)

Now, where did your car go—where did you stop your car, did you stop your car?

A. Yes, right behind his car.

Q. Put a mark where you stopped your car.

A. Right about here (indicating).

Q. That is R.H.=4. You stopped a little bit north of the track, is that correct? A. Yes.

Q. But you headed toward the rear of his car?

A. That's right, right behind him.

Q. Now, did you observe the driver of the coupe doing anything at that point?

A. Well, at that time when we stopped, as I pulled up and stopped, I started wiping my windshield and could see he was doing the same. [44]

Q. Through his back mirror?

A. Through the back window, that's right.

Q. It was cold that morning?

A. The windows was fogged up.

Q. You wiped off your windshield, and you looked through his rear window and saw him wiping his? A. Yes.

Q. What happened then? Before I ask you that, about how long were you, were you and he stopped at that point, do you know?

A. I don't remember exactly how long.

Q. What is your best recollection and best judgment?

A. Maybe a minute, minute and a half, something like that.

Q. Then what happened?

A. We just were going up on the track.

(Testimony of Raymond Arnold Hewes.)

Q. He started going across the track?

A. Started crossing the crossing, yes.

Q. Did he go across rapidly?

A. No, just moved along slow.

Q. And what did you do?

A. I just pulled up just about where he stopped.

Q. In other words, you moved your positions from R.H.=4 to R.H.=3? A. Just about.

Q. At that time, and did you have occasion to look across the crossing to the other side of the street? [45]

A. I wasn't very interested. I pulled up to this stop sign and stopped.

Q. There is a stop sign there, is there?

A. Yes.

Q. Place about where you recall the stop sign.

A. It would be—I don't remember exactly where.

Q. Your best recollection.

A. I would say right in here, somewhere; I think it is about right here (indicating).

Q. We will call that R.H.=5; that was the stop sign? A. Yes.

Q. You pulled up and stopped where he had been, is that right? A. Yes.

Q. He was in turn going across the crossing?

A. Yes.

Q. Now, at that time, had you heard any whistles blowing, or any noise of any kind?

A. No, not that I recall, I never heard——

Q. Did you hear any bells? A. No.

Q. Heard nothing?

(Testimony of Raymond Arnold Hewes.)

A. I didn't hear a thing.

Q. Did you see anything on the other side of the crossing at all? A. No, not at all. [46]

Q. See any lights on the other side?

A. Only lights was across the street, you could see.

Q. Across the street, across Center Street?

A. Center Street.

Q. Where, will you give us just generally, pointing without marking?

A. Right about in here, right where the High Tower station was.

Q. The High Tower station; is that a service station? A. A service station.

Q. A service station in this general area across on the other side of the crossing? A. Yes.

Q. Those the only lights that you could see?

A. Only lights I noticed when I pulled up there.

Q. Now, had you gone across the Howard Street crossing before?

A. Well, I went across there several times.

Q. You know anything about whether there were any crossing signals there?

A. There was one there.

Q. One there. Can you mark about where that crossing signal was? We are speaking now of the time, of course, of the accident.

A. I don't know exactly where it is in here.

Q. About.

A. It is pretty close in here. [47]

Q. All right, about in there. You marked an-

(Testimony of Raymond Arnold Hewes.)

other X, and we will call that R.H.=6. Have you ever seen that signal in the daylight? A. Yes.

Q. What kind of a signal is it?

A. It is a wig-wag signal.

Q. A wig-wag signal. Did you ever see it in operation? A. Yes, I have seen it.

Q. What does it do when it operates?

A. It goes back and forth, and the red light is supposed to shine.

Q. Is the red light supposed to shine?

A. And a bell rings.

Q. This morning, as you stopped here at R.H.=3, you didn't see any red light——

Mr. Phelps: I object to that as leading and suggestive.

Mr. Murman: Already testified he saw nothing but the lights.

The Court: It was leading, you had better re-frame the question.

Q. (By Mr. Murman): As you stopped here at R.H.=3, what, if anything, did you see in the general direction of R.H.=6 where you placed that?

A. Never seen anything except the lights across the street.

Q. Never saw anything except the lights across the street? [48] A. No, sir.

Q. But you were looking in that direction?

A. Yes, had to to cross.

Q. Now, as you stopped here at R.H.=3, did you see—did you watch the coupe go across the tracks? A. Yes.

(Testimony of Raymond Arnold Hewes.)

Q. What happened?

A. Well, he got about midway of the main track, that is where the train hit the back and was right about the middle of the track, that is here.

Q. Back end of what? A. Of the coupe.

Q. Was it the middle of the main tracks?

A. Yes.

Q. That was where it hit him, is that what you said? A. That's right.

Q. Where did you first see the train as you were stopped here at R.H.—

A. Sitting right about where Shanahan was. All I seen was just the lights.

Q. All you saw was the lights?

A. That is all I seen.

Q. Did you see the lights at any time before you got to this point where you stopped?

A. No. [49]

Q. That is R.R.—3? A. No.

Q. Never saw a light before that point?

A. No.

Q. Did you hear a whistle at any time?

A. No, I didn't.

Q. Now, when you saw the light, did you look at the direction of the light?

A. Yes, just glanced, that is all I had time for.

Q. About how much time elapsed between the time you saw the light and the time that the collision occurred?

A. About a second or two; I don't know how long it was.

(Testimony of Raymond Arnold Hewes.)

Q. Just—you said a second or two?

A. About that, I guess, as I can recollect.

Q. A short interval of time? A. Yes.

Q. What happened after the train hit the coupe?

A. After it hit the coupe and passed through, we pulled across the crossing.

Q. The train completely cleared the crossing?

A. Yes, sir.

Q. Did you see what happened to the coupe after it hit it?

A. I seen it hit it and that was all.

Q. Did you notice the speed of the train as it went across the crossing? [50]

A. Well, I would say it was going about 60—65, somewhere.

Q. You have driven an automobile for a long time, have you? A. Yes.

Q. Based on your experience as a driver, you judge the train was going 60 to 65?

A. Yes, about that.

Q. All right, you go back and sit down.

Now, when the train hit the coupe——

The Court: I think we will take a recess. Ladies and gentlemen of the jury, bear in mind the admonition I have heretofore given you.

(Short recess.)

Q. (By Mr. Murman): Mr. Hewes, as you saw the coupe go across the crossing in front of you, what, if anything, did you notice about the rear of the automobile?

(Testimony of Raymond Arnold Hewes.)

A. The only thing, the tail lights were burning.

Q. You say the tail light was burning?

A. Yes.

Q. Now, at the time the collision occurred, did you still have your headlights on? A. Yes.

Q. And you still had your windshied wiper going? A. That's right.

Q. And after the collision occurred, did you continue on across the crossing from the division R.H.—3 where you were [51] stopped?

A. Yes.

Q. And where did you stop the car?

A. Stopped just on the other side of the crossing.

Q. Did you get out of the car?

A. Yes, we both got out.

Q. Where did you go?

A. Went over to see what we could do, see if he was alive or not.

Q. Did you know it was Mr. Shanahan?

A. Not at the time.

Q. Did you later learn it was his name?

A. Through papers we picked up.

Q. Did you go down and see the body?

A. Yes.

Q. And have you any idea about how far from the crossing the body was when you saw it?

A. I believe about 120 feet.

Q. 120 feet—keep your voice up a little—and on which side of the main track was it, to the west or the east? A. The west side.

Q. And where was the coupe?

(Testimony of Raymond Arnold Hewes.)

A. It was on the west side, too, about 20-30 feet from the body.

Q. 20 to 30 feet from the body? [52]

A. That's right.

Q. Did you go over and look at it?

A. Yes.

Q. I believe you said Mr. DeRosa was with you in the automobile? A. Yes.

Q. Did he go with you to look at the body and the automobile? A. Yes.

Q. I show you what purports to be a photograph of the damaged automobile, and ask you to tell me whether or not you have seen that automobile, if that is a picture of it, before?

A. I believe it is; it looks just about the same.

Q. About the same as what?

A. Same as it was when I first seen it.

Q. Same as what was? A. The coupe.

Q. The coupe? A. Yes.

Q. All right. When you first saw it at 140 or 150 feet, 20 or 30 feet beyond the body, it was in that condition, was it? A. That's right.

Mr. Murman: At this time, if the court please, we will ask that the picture be admitted as Plaintiff's exhibit next in order, in evidence.

Mr. Phelps: No objection.

The Clerk: Plaintiff's exhibit 7 in evidence. [53]

(Whereupon photograph of car, referred to above, was admitted in evidence and marked Plaintiff's Exhibit No. 7.)

(Testimony of Raymond Arnold Hewes.)

Q. Now, do you have any recollection, Mr. Hewes, at about what time the actual collision occurred?

A. Either around 7:40, 7:45.

Q. 7:40 or 7:45. After you saw the automobile, did you continue on to your work?

A. Yes, we went back to the car and continued to work.

Mr. Murman: At this time, may I display plaintiff's exhibit 7 to the jury?

(Handing exhibit 7 to the jury.)

Q. Now, Mr. Hewes, there is already in evidence plaintiff's exhibit 3. Can you tell me what that is a picture of?

A. It is a picture about where the car was, over here (indicating).

Q. What car? A. Shanahan's car.

Q. At what time?

A. I don't know. This looks like it was taken in the daytime.

Q. But you said a picture about where the Shanahan car was? A. Yes.

Q. At what time—you made several marks on the map.

A. About the time I pulled behind him, which was about 7:30, something like that.

Q. You mean when you pulled up behind him at the crossing? [54] A. Yes.

Q. You say that is a picture showing about where he was, is that correct?

(Testimony of Raymond Arnold Hewes.)

A. About where he was, or a little farther south.

Mr. Phelps: May I see it?

Mr. Murman: That is plaintiff's exhibit 3.

Mr. Phelps: I didn't know which one it was. The objection I have, if your Honor please, I thought the question was as to where it was on the picture, but as to whether or not it was the view from where he was I would object as calling for a conclusion, as to the view the driver had at any particular point, that does call—I think that would be a conclusion.

Mr. Murman: Let me ask another question, Mr. Hewes,——

Mr. Phelps: I ask that go out then.

The Court: Will you read the last answer?

(Last answer read by the reporter.)

The Witness: That would be north.

The Court: Well, I will let the answer go out. Reframe the question.

Q. (By Mr. Murman): Mr. Hewes, was it your testimony that you stopped at the point you marked as R.H.-3 when you first saw the Shanahan car stop?

A. Yes. No, where I first seen him stop, when I stopped right behind him, and then—— [55]

Q. Didn't you say you pulled up to where he had been stopped? A. Yes.

Q. And you stopped there yourself?

A. That's right.

Q. Now, calling to your attention to that photograph, what is that a picture of?

(Testimony of Raymond Arnold Hewes.)

A. Be just about what you could see from this point.

Q. Where you had stopped yourself?

A. Yes.

Q. After Mr. Shanahan pulled forward and you had pulled up to where he was, is that right?

A. That's right.

Q. Now, in plaintiff's exhibit 5, there is shown on the left-hand side of the photograph what looks like a wig-wag signal. Is that the wig-wag signal to which you have been referring?

A. Yes, it is.

Q. That is the same signal that you marked up here at R.H.-6, is that correct? A. Yes.

Q. Mr. Hewes, did you see any flagman at that crossing at the time that you stopped at R.H.-3, or at any other place? A. No.

Mr. Phelps: I will object, incompetent, irrelevant and immaterial; outside the issues of the case.

The Court: Because of what? [56]

Mr. Phelps: Outside the issues of the case, no claim there should be any flagman here that I have heard yet.

The Court: I will overrule it. It must be apparent to you.

Q. (By Mr. Murman): Did you answer the question?

A. I did; I said no, there was no flagman there.

Mr. Murman: You may cross-examine.

(Testimony of Raymond Arnold Hewes.)

Cross-Examination

By Mr. Phelps:

Q. Now, Mr. Hewes, as a matter of fact the day was just about breaking, was it not, at the time of the accident; daybreak?

A. Well, it would be, yes.

Q. So it was not dark in the sense——

A. It was still dark—it wasn't plumb dark, no.

Q. Dawn had started to break some little time before that?

A. I don't know about the dawn, it was misty, so it was still fairly dark.

Q. Well, you are talking about two different things. I am trying to find out what the condition was with respect to daylight, night, twilight or dawn.

A. Well, I guess it would be dawn.

Q. It would be dawn? A. Yes.

Q. In other words, it wasn't the black of night?

A. No. [57]

Q. All right. And you have that intermediate stage between the darkness and when the sun rises; it was some time in there?

A. Yes.

Q. Now, some time during that 25 or so minutes of dawn, is that right?

A. That is right, about right.

Q. And do you know approximately or do you know when the sun rose that day?

A. No, I don't know exactly.

Q. All right. So that you could then see objects without the aid of your headlights?

(Testimony of Raymond Arnold Hewes.)

A. Well, you could see it, yes, if fairly close.

Q. You could see the station without your headlights?
A. Yes, drove right by it.

Q. And you could see the freight cars on the other crossing without your headlights, couldn't you?
A. Yes.

Q. Didn't need your headlights for that, you could see the stop sign without your headlights?

A. No—well, yes.

Q. The arterial stop sign?

A. Stopped right by it.

Q. And you could see other objects in and around there without your headlights?
A. Yes. [58]

Q. Did you say it was misty; was that a low-hanging mist, or a high mist?

A. That I wouldn't know. It was just misty.

Q. Just a little misty?
A. Yes.

Mr. Murman: Not a little misty, he said misty.

Mr. Phelps: I am cross-examining, if he wants to correct me he can, rather than you, Mr. Murman. If he wants to say not a little misty, then it should come from him, not from you.

Q. Now, Mr. Hewes, talking about this mist, as a matter of fact it was a little overcast, wasn't it?

A. I guess you would call it overcast.

Q. It had rained the night before?

A. I don't recall whether it rained or not.

Q. Rained rather heavy the night before, didn't it?
A. I don't know.

Q. Were the streets a little bit wet from rain?

(Testimony of Raymond Arnold Hewes.)

A. I don't know whether it was from rain or mist?

Q. So as a matter of fact, you don't know then whether this mist was of sufficient quantity to cause dampness to the streets, do you?

A. It could have.

Q. It could have or could not have; you don't know?

A. It was thick enough, it could have; it was coming down pretty heavy. [59]

Q. On the other hand, it could have been from the rain? A. Could have, if it rained.

Q. Now, as you were driving along, you say you used your windshield wiper, is that right?

A. That is right.

Q. Did you use it all the time, or just off and on?

A. All the way down to the job.

Q. All the way down to the job?

A. That is right.

Q. Even after this accident?

A. That is right.

Q. Could you see the High Tower service station across the way? A. Yes.

Q. Could you see the other buildings across on 99?

A. I could see the outlines of them.

Q. Yes, you could see the outlines of the other buildings across the highway over here in this area on the map?

A. Well, no, not over here; you could see over

(Testimony of Raymond Arnold Hewes.)

here when we stopped. Over to your left, right straight across.

Q. Could you see the outlines of the buildings without reference to the light on them?

A. Yes.

Q. Whatever visibility there was, it was that good?

A. Yes, it was that good, because that High Tower light is [60] bright on that side, all white lights.

Q. But you could see the outline of the buildings, I am getting at, not just the light? A. Yes.

Q. And when you looked, I take it that you looked—well, withdraw that a moment. When you came down from wherever you were coming from, which street did you approach Center Street. Did you come down, go south on Center?

A. That is right.

Q. You don't live in the town of Anderson?

A. No, sir, I live up toward Redding, about six miles out.

Q. As you were coming south on Center Street, then, you saw this car, this coupe, coming out of Howard Street? A. That is right.

Q. It was coming—it had come out of, or was going west on Howard Street?

A. Yes. Going west?

Q. Yes. A. Yes, it would be going west.

Q. Coming out of Howard Street, made a left-hand turn into Center Street, is that right?

A. That is right.

(Testimony of Raymond Arnold Hewes.)

Q. And turned left, to your left and on Center it had to turn again to your right at the jog of the crossing over the track?

A. That is right. [61]

Q. Will you step to the board, please? We have simply a cross. Will you indicate to us the position of the car as you saw it, relative position of the car, by drawing a rectangle. I have this in mind—in other words, I have drawn something like that (indicating) rather than just a cross, will you please? This was the position of the car when you first saw it in the street?

A. This is the car right here (indicating).

Q. Have you drawn a red rectangle over your cross there at "R.H.-1." Was that lengthwise of that? Which way would that be headed?

A. This way, this direction.

Q. You indicate which way?

A. Going this way. The front would have to be this way.

Q. You have drawn a line out. I will put an arrow on it. Is that all right? Does that indicate the direction of it? A. Yes.

Q. Will you also draw a rectangle to indicate the position of the car, the relative position and head in the street at the time you saw it come to a stop and that you came to a stop?

A. Like this (indicating).

Q. Which way was it headed? A. Across.

Mr. Murman: May the record show that is R.H.-3?

Mr. Phelps: I was just about to do that, Mr.

(Testimony of Raymond Arnold Hewes.)

Murman. [62] At R.H.-3 he has drawn another rectangle to indicate the car, the position of the car as it was stopped.

Q. Where were you at that time?

A. That is where I first seen the car. I was right about there (indicating).

Q. Headed south? A. Yes.

Mr. Murman: That is R.H.-1, isn't it?

A. Yes.

Mr. Phelps: Yes.

Q. At the point, where did you come to a stop behind him?

Mr. Murman: Pardon me, it is R.H.-2. I had the wrong numeral.

Q. (By Mr. Phelps): Will you describe that rectangle so that I can see in which direction your car was headed? A. This direction.

Q. Will you draw an arrow from that line to indicate the direction in which the car was headed? That is a rectangle drawn over R.H.-4. That indicates the position of the car when you stopped?

A. The front of it.

Q. Headed diagonally towards the Howard Street crossing? A. I was right behind him.

Mr. Murman: Do you want him to draw a good rectangle?

Mr. Phelps: I think we can understand from the arrow [63] which way it is going. Will you resume the stand?

(The witness resumed the witness stand.)

(Testimony of Raymond Arnold Hewes.)

Q. (By Mr. Phelps): Now, then your windshield was steaming up, is that right?

A. That is right.

Q. That was from the weather? On the inside, I am talking about now.

A. It was warm inside, that is the reason it was steamed up.

Q. Your breath, and so forth, got on the windshield? A. That is right.

Q. That hasn't got anything to do with rain or mist on the outside? That was inside?

A. It was the dampness and coldness on the outside that caused it.

Q. What kind of car were you driving?

A. I was driving a 1941 Pontiac.

Q. What? A. 1941 Pontiac.

Q. Did you have a defroster?

A. Yes, I did.

Q. Did you use it?

A. But it wasn't working.

Q. As you came to a stop behind him, about, approximately how far behind his car were you when he came to a stop and you came to a stop behind him? [64]

A. Front was about five feet from his car, I guess.

Q. As you came to a stop, you observed him wipe off his windshield, is that right?

A. That is right.

Q. On the inside? He didn't get out?

(Testimony of Raymond Arnold Hewes.)

A. On the inside. No, he didn't get out.

Q. Just with his hand, is that right?

A. That is right.

Q. Didn't use a handkerchief or anything, just wiped it off?

A. No, just his hand going back and forth.

Q. Directly in front of him?

A. That is right.

Q. That is all you saw him doing?

A. That is all I saw him doing.

Q. You didn't see him do anything else, then, than what you have just told me?

A. Not that I recall.

Q. When you saw him do that, then in order to see it you had wiped yours off, too, is that right?

A. No, I wiped mine off first. I could see him wiping his off.

Q. Not afterwards? All right. So then you did wipe your windshield, and he continued on forward, started on, and after he started up did he again come to a stop at any time up until the collision? [65]

A. No.

Q. You have shaken your head. The reporter can't get that.

A. No stop at all.

Q. Did he after starting up, did he ever appear to slow down at any time?

A. No, just seemed to keep the same speed and went on across the track.

Q. Did he appear to accelerate?

A. Speed up?

(Testimony of Raymond Arnold Hewes.)

Q. Yes. A. No.

Q. At any time? A. No.

Q. After having started up?

A. No, just went on up across the tracks, just about the same speed.

Q. The same speed? He had reached a speed which was constant with him?

A. Yes. He was going slow across the tracks.

Q. My question is, had he accelerated up or still going faster or had he reached a speed which was constant with him?

A. No, just kept the same speed he started out with.

Q. About how long after he started out did he reach that speed which was constant with him up to the point of the accident, and how far did he go before he reached that speed? [66]

A. I don't know. Well, he just—he was going slow all the time, so I wouldn't know how fast he was going. I wouldn't know.

Q. Do you have any knowledge, any estimate of his speed? A. No.

Q. You don't know, is that it?

A. I just pulled up where he was and stopped and then started going across it.

Q. Now then, were the windows in your car closed? They were, weren't they?

A. That is right.

Q. Where you, you say, couldn't hear the whistle?

A. That is right, I didn't hear the whistle.

(Testimony of Raymond Arnold Hewes.)

Q. You don't mean to say there wasn't a whistle, a whistle sounded, do you?

A. No, I don't mean there wasn't. I never heard it.

Q. That is all you can say? A. That is all.

Q. Whereas you say you didn't hear a bell, again you don't mean to testify that a bell was not sounded? A. That is right.

Q. It could have been sounded?

A. It could have. I didn't hear it at all.

Q. Once again, whereas you say you didn't see a wig-wag signal working, you don't mean to testify that it wasn't [67] working, but again you only did not see it?

A. It wasn't working, so far as I know, because if it was working I would have seen it.

Q. Will you answer my question?

Mr. Murman: That is an answer.

Mr. Phelps: May I go on, if your Honor please? I am not making any motion to strike.

The Court: Proceed.

Q. (By Mr. Phelps): Mr. Hewes, you have testified so far you didn't see it working, isn't that true? A. That is right.

Q. That is all you know about it?

A. That is right. It wasn't, so far as I know, it wasn't working. If it had been working I could have seen it from the position I was.

Mr. Phelps: I will ask that go out, as not respon-

Mr. Murman: I think it is responsive.
sive, if your Honor please.

(Testimony of Raymond Arnold Hewes.)

Mr. Phelps: It isn't responsive to my question, which is very pointed and he knows perfectly well it is pointed and he is not answering the question.

Mr. Murman: Mr. Phelps is asking this witness to speculate.

Mr. Phelps: I am asking him what he saw, that is all I am asking him. [68]

The Court: I think he answered it. He said he didn't see it.

Mr. Phelps: That is what I am getting at.

Q. (By Mr. Phelps): That is all you know of it, you didn't see it?

A. I didn't see it working.

Q. So far as your frame of mind was concerned then from that, you don't know whether it was working or not, isn't that true?

Mr. Murman: That is argumentative.

A. It wasn't working, so far as I know.

The Court: I think I will let the answer stand.

Mr. Murman: I didn't hear the answer. I am sorry.

The Court: The answer was, it wasn't working so far as he knows.

Mr. Murman: Yes, your Honor, I am sorry.

Q. (By Mr. Phelps): Is that the best answer you can give to my question, that you don't know whether it was working or not?

A. As far as I am concerned, it was not working. If it was, I would have seen it going back and forth.

Q. All right. Now then, as a matter of fact—

(Testimony of Raymond Arnold Hewes.)

withdraw that a moment. Let's go to another subject here. So far as the light or any wig-wag signal, covering that specifically, you say you didn't see a light or wig-wag signal, is that right?

A. That is right.

Q. I will ask you the same question so that it will be [69] perfectly clear. As a matter of fact, that is all you know, you didn't see it, you don't know whether it was working or not, isn't that right?

A. If it was working it should have had the red light on it, shouldn't it?

Q. Answer the question. So far as you know, you don't know whether the light was on or whether it was working.

A. It was not working.

Q. You didn't see it, isn't that the extent of your knowledge?

A. That is right, I didn't see it on there.

Q. Do you remember when—is your memory any better now about this accident than it was on the day after the accident?

A. I don't know whether it would be or not, I guess.

Q. You have talked to Mr. Murman, have you not, since coming down here?

A. That is right.

Q. And you have talked to the investigator for the United States Government, Mr. Wickfield, who is sitting here, correct?

A. That is right.

Q. And he told you he was an investigator for

(Testimony of Raymond Arnold Hewes.)

the Government for their interests in the case?

A. I guess that is right, yes.

Q. And you talked to him?

A. That is right.

Q. When did you first talk to him? [70]

A. That I wouldn't know.

Q. Several days after the accident, wasn't it?

A. Some days, I guess.

Q. Three or four days after the accident?

A. I don't know exactly.

Q. At any rate it was some time after December 28, the day after the accident, wasn't it?

A. December 27, wasn't it?

Q. The accident happened on the 27th.

A. 27th, yes.

Q. I say you talked to Mr.—what's his name?

Mr. Murman: Wickfield.

Q. (By Mr. Phelps): Wickfield, several days after the accident, not just the day after?

A. Not that I recall. I don't remember.

Q. Do you remember when your statement was taken and you were asked questions by a representative—

Mr. Murman: May I see it?

Mr. Phelps: Yes, certainly, but I am asking him some preliminary questions first. You can look at it if you wish while I am asking these preliminary questions.

Q. (By Mr. Phelps): Do you remember when your statement was taken by a representative of the Southern Pacific on the day after the accident?

(Testimony of Raymond Arnold Hewes.)

A. I can't recall. I know there was a statement taken. [71]

Q. When that statement was taken you were trying, I take it, to truthfully and accurately set forth that which you knew about the case at that time?

A. That is right.

Q. He asked you questions and he wrote down in narrative form what you told him about it, didn't he?

A. That is right.

Q. After he got all through, you read it and then signed it, didn't you?

A. That is right.

Q. And you did read that statement?

A. I did.

Q. And did you think those things that were in this statement were true and correct as to your knowledge at that time, isn't that right?

A. What was that again?

Q. I said, the things you got in that statement, after reading it, were true and correct?

A. That is right.

Q. He stated them as you had said it?

A. That is right.

Q. All right, I will show you then a paper of three pages and ask you to read that and see if you can identify that as the statement which was taken the day after the accident. First, if I may——

Mr. Murman: Let him read it, Mr. Phelps. He is trying to read it.

Mr. Phelps: I am sorry. I was going to ask him first to identify his signature for the record.

Q. (By Mr. Phelps): Will you first look at the

(Testimony of Raymond Arnold Hewes.)

signatures there and tell us whether or not those are your signatures? A. Yes, those are mine.

Q. All right. You are handing me back a document which I have shown you, and I asked that it be marked for identification, and I want to ask you some questions about it.

(Statement of Mr. Hewes was thereupon marked Defendant's Exhibit C for identification.)

Q. (By Mr. Phelps): Now, Mr. Hewes, the first three places here, the name appears, "Raymond H. Hewes." Are those your signatures on all three pages? A. That is right

Q. And the last page, your signature appears before this statement: "I, Raymond H. Hewes, have read and understand the foregoing statement of three pages and it is true and correct to the best of my knowledge and belief."

A. That is right.

Q. That was there and you knew that?

A. Yes.

Q. And this statement is true and correct, to the best of your knowledge, is it not? [74]

A. That is right.

Q. I call your attention, then——

Mr. Phelps: At this time, if the Court please, I should like to read into evidence this statement, which we now offer in evidence.

Mr. Murman: I am going to object to the reading of the entire statement because I understand

(Testimony of Raymond Arnold Hewes.)

the witness is only being questioned at the moment as to the wig-wag signal.

Mr. Phelps: Questioned about everything. He said it was true and correct.

Mr. Murman: I don't think that is competent evidence except to the one point we are talking about.

The Court: I think if it is being used for impeachment, only that part which impeaches should be read if they object to the rest of it.

Mr. Phelps: Does the Court rule I can only question him with reference to that portion referring to the wig-wag?

The Court: Yes, at the present time.

Mr. Phelps: My offer at this time is general and I offer the entire document.

The Court: I will look it over during recess. In the meantime if you wish a particular thing, to read from it——

Mr. Phelps: I do, your Honor. All right, I call your attention—I show you first, counsel——

Mr. Murman: I have read it. [75]

Q. (By Mr. Phelps): I show you—I call your attention to these—read this, first (handing exhibit to the witness). A. Yes.

Mr. Phelps: Counsel, I want to show you the part I want to read (showing document to counsel).

Mr. Phelps: I will read this to you and ask you if you made this statement and if it isn't true and correct and this was what you said at that time: "I cannot state whether or not the wig-wag signal at the crossing was operating at the time of the

(Testimony of Raymond Arnold Hewes.)

accident or not, although I did not see any type of light burning or any signal at the crossing and did not observe any signal at the crossing. I also did not hear any signal bells ring, but this may also be due to the fact that the windows were closed on my car."

Mr. Murman: I submit that is not impeaching, if your Honor please. That is consistent with the witness' testimony.

Mr. Phelps: Well——

The Court: Just a minute. I will allow the matter that has been read to stand in the record.

Q. (By Mr. Phelps): Did you make that statement? A. That is right.

Q. That is still true and correct, isn't it?

A. That is right.

Q. So that you don't know whether the wig-wag signal was working or not? [76]

A. That is right. It wasn't working or else the red light would have been there, isn't that right?

Q. Well, Mr. Hewes, this is a true and correct statement that you can't state whether it was working, isn't that right?

A. If I stated it there, why, I guess that is what it was at that time, yes.

The Court: We will take a recess now until two o'clock. Ladies and gentlemen of the jury, during recess will you bear in mind the admonition I have heretofore given you?

(Thereupon an adjournment was taken until 2:00 o'clock p.m., this date.) [77]

December 21, 1949, at 2:00 o'Clock

RAYMOND ARNOLD HEWES

resumed the stand.

Cross-Examination

(Continued)

By Mr. Phelps:

Q. Mr. Hewes, before the recess I was asking you some questions about your statement, I believe. The question of whether or not you saw the wig-wag operating or not. Now, do you remember seeing the stand of the wig-wag, or do you remember that? A. I don't remember much about that.

Q. You don't remember seeing the stand of the wig-wag at all? A. No.

Q. Nor the post?

A. I didn't pay much attention to it.

Q. Yes, you didn't pay much attention. Now, then, Mr. Hewes, do you remember talking to a police officer, Officer Sublett—did he interview you after this accident? A. No.

Q. He didn't interview you at all?

A. Not that I can recall, he didn't.

Q. You didn't go into the highway patrol in Redding, then you weren't interviewed by any of the highway patrol officers?

A. Yes, interviewed by the coroner, but not by the highway patrol. [78]

Q. But not the highway patrol?

A. Not that I recall; I might have been.

(Testimony of Raymond Arnold Hewes.)

Q. Well, you remember if you were, wouldn't you? A. I don't recall that I was or not.

Q. You were interviewed by the coroner; where was that? A. In Redding some place.

Q. When was that?

A. That I couldn't tell you, because I don't know.

Q. Who was present?

A. The coroner, some officers.

Q. Anyone else? A. And John DeRosa.

Q. John DeRosa? A. Yes.

Q. You say you do remember that, but you don't remember being interviewed by the highway patrol?

A. No, I don't.

Q. You don't remember—to refresh your recollection, you were called into the highway patrol and being interviewed by an Officer Sublett, along with a Captain Foster at the highway patrol office at Redding a few days after the accident?

A. Oh, yes.

Q. You do remember that now? A. Yes.

Q. And at that occasion you knew those officers were investigating [79] the cause of this accident and the surrounding circumstances, didn't you?

A. Yes.

Q. And on that occasion they asked you questions about what you saw and what you knew, didn't they? A. Yes.

Q. And Mr. DeRosa, who was with you in the automobile, was also with you when they were asking those questions? A. Yes.

(Testimony of Raymond Arnold Hewes.)

Q. And when you answered those questions you were endeavoring to answer them to the best of your ability, truthfully, weren't you?

A. That is right.

Q. You weren't trying to hide anything, you were trying to cooperate with the officers?

A. That's right.

Q. And assist them in their investigation, is that right?

A. That is right.

Q. Now, do you remember stating—tell us whether or not you stated to Officer Sublett in the presence of Captain Foster and Mr. DeRosa that you had no idea whether the signal was operating or not, that you couldn't say that it wasn't operating?

A. Give it to me again.

Mr. Murman: This is a statement in writing or an oral [80] statement?

Mr. Phelps: Read the question.

(Question read.)

A. I don't know that I made that statement then or not.

Q. Will you say you didn't make that statement?

A. I won't say I didn't, but I might have, but I don't know for sure whether I did or not.

Q. And will you tell us whether or not on that same occasion, the same people present, you said that you didn't pay any attention to the wig-wag and didn't see it and wasn't looking for it?

A. Oh, no, I didn't say anything like that that I recall, I didn't—

(Testimony of Raymond Arnold Hewes.)

Q. Could you have said that to them?

A. I always look for signals on them crossings.

Q. My question, could you have said that to them, you think you might have?

A. I might have, but I don't recall saying it.

Q. But you might have told them?

A. I could have very handily, but I don't recall saying it.

Q. And you remember telling the coroner that you couldn't say one way or the other as to whether the signal was working or not, that you could not say that it wasn't working?

A. I told him as far as I was concerned it wasn't working because I didn't see it working. [81]

Q. That you didn't see it working, but you wouldn't say whether or not it was working, isn't that a fact?

Mr. Murman: That isn't his testimony. I object to it as not being the testimony——

The Court: Read the answer again.

(Answer read.)

Mr. Phelps: My question, if your Honor please, picked it up from there.

The Court: All right.

Q. (By Mr. Phelps): Didn't you tell him that you didn't know whether it was working or not and couldn't say that it wasn't working?

A. As far as I am concerned it wasn't.

Q. That is your best recollection?

A. That's right.

(Testimony of Raymond Arnold Hewes.)

Q. Now, how long after the accident did you stay around?

A. About 5—10 minutes, something like that.

Q. Did you stay long enough to see the ambulance arrive?

A. No, we come back when the ambulance was there. We went off to work, it was raining, so got laid off the job, and went back there. That is when the ambulance was there.

Q. That was later? A. Yes.

Q. When did you come back—how long before you went, continued on to your work, do you think you stayed? [82]

A. About 5-10 minutes.

Q. About 5 or 10 minutes. By that time had any police officer arrived.

A. I don't know. I think there was one there, a highway patrolman.

Q. Highway patrolman there at the time you arrived?

A. I think so.

Q. Do you remember what he looks like, can you describe him?

A. No, not now I can't.

Q. How was he dressed?

A. A policeman's uniform.

Q. A state highway patrolman's uniform?

A. State highway patrolman.

Q. Did you see him drive up in a state highway patrol car, a white car?

A. Yes.

Q. He drove up before you left?

A. Yes.

Q. You remember that now?

A. I am pretty sure it was before we left.

(Testimony of Raymond Arnold Hewes.)

Q. And right there at the scene of the accident before you left to go back to work, did he interview you? A. No.

Q. Did you volunteer to him at that time, state to him that you had seen the accident at that time? [83]

A. No, I don't believe I did.

Q. You did not? A. No.

Q. Did he inquire in your presence and ask whether among the group there had anyone witnessed this accident?

A. I don't know whether he did. I believe he did, I am not sure.

Q. He did? A. I think he did.

Q. You didn't volunteer and say you witnessed this accident, although you were right behind and saw the whole thing? A. That's right.

Mr. Murman: That is immaterial.

The Witness: I was behind and I seen the whole works.

Q. (By Mr. Phelps): And you didn't volunteer the state highway patrol officer that you witnessed—— A. Not that I recall, I didn't.

Q. Instead of that you left the scene of the accident without telling the officer how it happened, or telling anyone that you had witnessed it, is that right.

A. Well, I was kind of late for work, so I took off for work.

Q. And when you took off for work, had anyone else arrived in an official capacity?

A. I don't know.

(Testimony of Raymond Arnold Hewes.)

Q. Such as a coroner? [84] A. No.

Q. The town constable?

A. I think the constable was there; I am not sure.

Q. He was there in addition to the highway patrol?

A. I think he got there about eight o'clock. He got there after we left.

Q. He got there after you left? A. Yes.

Q. You are now talking about a constable?

A. Constable, yes.

Q. All right. You know who that constable was, you knew his name? A. Casebeer.

Q. That is the one that arrived after you left? He didn't arrive before you left, put it that way?

A. I don't think so.

Q. All right. Now then, how long were you away from the scene of the accident before you returned?

A. I don't know, about, oh, 20-30 minutes, I think.

Q. And when you returned had the ambulance, had it yet arrived?

A. Yes, the ambulance was there.

Q. And how long did you stay the second time when you were there?

A. I don't know, not very long; I don't know just how long.

Q. Well, 5-10 minutes, 20 minutes? [85]

A. About 10 or 15 minutes, or something like that.

Q. In this connection, did you talk to the high-

(Testimony of Raymond Arnold Hewes.)

way patrol officer who was conducting the investigation? A. Not there, I don't think I did.

Q. Did not. You didn't tell him that you had seen the accident and what had happened?

A. I don't believe we did, might have. I don't recall.

Q. And you didn't tell the constable?

A. No, we never talked to the constable at all.

Q. And you didn't talk to the coroner at the scene of the accident?

A. I don't think so; I wouldn't be sure about that.

Q. At the time you left on the second occasion, after having returned from work, had Mr. Shanahan been taken away in the ambulance?

A. He was just being taken away when we got there.

Q. Just being taken away? A. Yes.

Q. And on this second occasion when you went there, any *any* time did the highway patrol officer, or the constable, either one of them, ask in your presence whether there was anyone here who had seen the accident?

A. I don't know whether he did or not. I didn't talk to anyone, anyhow.

Q. A moment ago you said you were asked by the highway patrol—— [86]

A. The way they got it, the witnesses was—my brother-in-law's brother came down after we was there and he told them. That is after we went to work, he was working on the same job.

(Testimony of Raymond Arnold Hewes.)

Q. All right. Now, Mr. Hewes, before you left the scene of the accident to go on to your work, during this period of 5 or 10 minutes after the accident, can you tell us during that 5 or 10 minutes after the accident what the condition of the visibility was; had it yet gotten light?

A. Well, it was fairly light. I couldn't say it was light so as you could see too far, but you could see within a radius—I don't know just about how far.

Q. How far?

A. You could see the buildings around close there.

Q. And while you were still at the scene and hadn't left the scene of the accident, and while the highway patrol officer was there, can you tell us whether or not it was light enough so that you could see buildings and trees at a distance of one block, two blocks, three blocks——

A. I don't know about that.

Q. And what don't you know?

A. I never paid much attention about that.

Q. Do you know whether it had, the dawn had broken to such an extent that the sky was light——

A. It was still misty when we left there.

Q. Well, I am not asking—— [87]

A. It was so you could see at a fairly good distance.

Q. All right. Didn't need flashlights or lanterns?

A. No.

Q. In fact, you didn't need flashlights or lan-

(Testimony of Raymond Arnold Hewes.)

terns at any time after the accident; you didn't need a flashlight to go down to see the accident?

A. After the accident why you would.

Q. Did you have a flashlight?

A. I never had a flashlight because we were right there where you could see. Had to strike a match in order to read those papers.

Q. And how far were you away from the wreckage of the car when you saw it? A. How far?

Q. Yes.

A. About 140-150 feet, something like that.

Q. So you were up here on the crossing when you saw the wreck of the car down there?

A. That is right.

Q. You didn't need the assistance of any lights or headlights?

A. The lights from across the buildings. You could see there, but you couldn't read nothing.

Q. The answer to my question is then, you could see, is that right?

A. You could see from the lights. [88]

Q. From across the street? A. Yes.

Q. Whatever the cause or reason, the simple answer to my question, you could see the wreckage from the crossing?

A. That is right, the lights showed that up.

Q. Now then,—and that was immediately after the accident before you went down there?

A. It was right after the accident.

Q. Now, as this car came to a stop, Mr. Shanahan's car, which you subsequently found out was

(Testimony of Raymond Arnold Hewes.)

Mr. Shanahan's car, came to a stop, can you tell us where it was with reference to the little incline or up-grade that goes from Center Street?

A. It was towards the bottom of the incline.

Q. So that the front end of his car stopped at the bottom of the incline?

A. Yes, that is about right.

Q. Yes. And a little grade going up there, and that is the grade you have reference to?

A. Yes.

Q. It was only after then he started up after having come to a stop that he went up this incline and over the tracks?

A. Sure, he went over the tracks.

Q. I understand that, but what I am getting at is, he didn't progress up this incline any amount until after he had started up after he stopped? [89]

A. Started from the bottom and kept a steady speed.

Q. So that whatever other physical facts we can determine, the point that you can now fix the place where he stopped, was the front end of the car was at the bottom of that incline——

A. Just about the bottom of it, I would say, yes.

Q. All right. And you also stopped at that same place, is that right?

A. That is right. After he moved up that is about where we stopped when he was on the track.

Q. Now, when you came to a stop there, do you remember—let me withdraw that and get in the sequence of events.

(Testimony of Raymond Arnold Hewes.)

Mr. Shanahan started up from that point, the bottom of the incline, and then you started up?

A. That's right.

Q. Now, had you come to a stop at the bottom of that incline also? A. That's right.

Q. Before the accident or after?

A. Before the accident.

Q. You stopped about the same place?

A. That's right.

Q. Then did you start up again before the accident, or did you stay right there until——

A. I started to start up just before the accident.

Q. You had started to start up? [90]

A. That's right.

Q. And how far had you gone at the time of the accident? A. About three or four feet.

Q. So that you, in turn, had only progressed three or four feet up the incline?

A. Just got on the incline.

Q. At the time of the impact?

A. That's right.

Q. Now then, at the time of the impact, did you come to a stop or did you continue on?

A. No, I stopped.

Q. You stopped right where you were?

A. That's right.

Q. Since you had only gone three or four feet you were going so slow that you were able to stop within a matter of inches or feet?

A. That's right.

Q. Then did you remain in that position, three

(Testimony of Raymond Arnold Hewes.)

or four feet up this incline, from that point until after the train cleared the crossing?

A. That's right.

Q. And it was only after that that you left that point and crossed the crossing and went down to the car?

A. After the train passed through, why, we crossed across and stopped.

Q. Now, you say you saw a light on the locomotive before the [91] impact; is that correct?

A. That's right, just before.

Q. That was the headlight of a locomotive?

A. That's right. I wouldn't know whether a locomotive, it was a passenger train.

Q. A passenger engine drawing the passenger train?

A. That's right.

Q. Did you see that just as it passed the line of the station house?

A. Just as I pulled up there, why, I seen; that is why I stopped.

Q. My question is, did you see that light as it came out from behind——

A. (Interrupting) That's right.

Q. ——the station? A. That's right.

Q. But you saw it just as it came out from behind the station? A. That's right.

Q. The only thing from the point where you were when you saw the light which obstructed your view at all was the station itself?

A. That's all.

Q. And you saw it just as soon as it came out from behind? A. That's right.

(Testimony of Raymond Arnold Hewes.)

Q. And then you saw the locomotive as it continued on and into [92] the automobile?

A. That's right.

Q. Now, at the time you saw that light as it came out from behind the station, the other side of the station, where was the car driven by Mr. Shanahan?

A. The back end was right about the middle of the track.

Q. What track?

A. The middle track, the main line.

Q. Will you come down and draw that for us, please?

(Witness went to the blackboard.)

Q. All right, just mark that 7. Draw a line down to that and mark it R.H.-7, and that indicates the position of Mr. Shanahan's automobile as the locomotive came out from—into view, the headlight of the locomotive came into view by the station.

A. Just a little beyond the station, that is right.

Q. And you indicated the front end of that car by an arrow. Regardless of the scale, you are putting the front end of the car in that position, indicating the front end—

A. That is right about here. He was hit right where the back end is (indicating).

Q. Were you playing your radio in your car?

A. No, it was out of order.

Q. Were you talking to Mr. DeRosa as you were coming?

A. Not at the time, not until after we stopped.

(Testimony of Raymond Arnold Hewes.)

Q. Just one other thing. Can you tell us your estimate that he stopped from the—a minute to a minute and a half—I take it that is your estimate, but is it fair to say that whatever time it took him to do what you have told us you observed him doing, wiping the front of his windshield, that was the time that he was at a stop; is that right?

A. That's right.

Mr. Phelps: I have no more questions.

Redirect Examination

By Mr. Murman:

Q. As a matter of fact, Mr. Hewes, you were wiping your windshield first, weren't you?

A. That's right.

Q. Was he stopped at the time you wiped your windshield?

A. That is right, he was stopped. I pulled up just right behind him, and I started wiping my windshield off.

Q. He came to a stop before you came to a stop?

A. That's right.

Q. After you wiped your windshield off, you looked through and saw him wiping his?

A. That's right.

Q. And it was after that then that he moved forward, is that correct?

A. That's right.

Q. Now, we have here defendant's exhibit A in evidence. Have you seen that picture before? [94]

A. I haven't seen it before, no.

(Testimony of Raymond Arnold Hewes.)

Q. You hadn't——

A. That is the crossing, yes.

Q. Now, will you mark on here, having in mind that this is the stop sign and the crossing where the accident occurred; isn't that right?

A. That's right.

Q. Will you mark on here where the front end of Mr. Shanahan's car was when he came to a stop with relation to the stop sign at the crossing. Just put it on the railing here. Is that the place where I am putting this cross?

A. Right there. (Indicating.)

Mr. Phelps: May I see it?

Mr. Murman: Let the record show, if the court please—that the witness has placed an "X" on Defendant's A in evidence, at a point on the Howard Street crossing, shown in that photograph, which is on the right-hand side of the photograph.

Q. (By Mr. Murman): Now, Mr. Hewes, in addition to addition to one of the other persons that questioned you, you were questioned by Mr. Whitfield, were you not? A. I think so.

Q. You remember him, don't you?

A. I don't remember him, no.

Mr. Murman: Will you stand up, Mr. Wickfield?

Q. Do you remember that gentleman?

A. Yes.

Q. Was he one of the gentlemen that questioned you? A. That is right.

Q. Do you recall him questioning you?

A. No, I don't remember him questioning me, no.

(Testimony of Raymond Arnold Hewes.)

Q. I show you what purports to be your signature, and ask you if that is your signature?

A. That is right.

Q. That is your signature? A. Yes.

Q. Would the date here of December 29th, 1948, refresh your recollection as to when he questioned you?

A. I guess it was around that time, some time; I don't know exactly when it was.

Q. Did you sign this paper at or about that date?

A. That is about right, yes.

Mr. Phelps: May I see it?

Mr. Murman: Yes.

Q. (By Mr. Murman): Do you remember at the time he questioned you——

Mr. Phelps: Just a minute, I object to anything as to what he told Mr. Wickfield, because he put this witness on the stand and he is trying to cross-examine his own witness.

Mr. Murman: No. [96]

Mr. Phelps: You want to cross-examine him?

Mr. Murman: I want to know whether he made the statement to Mr. Whitfield. You opened up the subject of statements.

Mr. Phelps: My objection is your are cross-examining your own witness. Hearsay and self-serving declaration what he said to somebody else.

The Court: I am not so sure of that. There is a case that was tried three or four years ago.

Mr. Phelps: In this, it would be a prior consist-

(Testimony of Raymond Arnold Hewes.)

ent statement and I shouldn't think it would be admissible.

Mr. Murman: That is what I want to show. I want to show it is a prior consistent statement.

The Court: If that is what you want—I have forgotten the name of that case.

Mr. Murman: I do not recall, but I think as long as Mr. Phelps opened up the subject, it is well within the rights of the plaintiff to show Mr. Hewes made a prior consistent statement.

The Court: That was the ruling I had in mind.

Mr. Phelps: The rule I have in mind—that is the law, of course. This was—it bears a later date than the statement which is in evidence.

Mr. Murman: By one day.

Mr. Phelps: Well, then it wouldn't be prior. It could be but one minute and not be prior. The rule wouldn't apply [97] if it were afterwards. I object to it on that ground.

Mr. Murman: You were talking about statements made to the Highway Patrol two or three days later, and reading statements made to the Coroner. This is certainly prior to those statements.

Mr. Phelps: Then, of course, if that is the purpose of the testimony, it isn't admissible at this time because I have only laid preliminary ground for the impeaching question. The other testimony is not yet in.

The Court: Sustain the objection at this time. I would like to have you bring to me that—I wish I could remember the name of that case—in that case,

(Testimony of Raymond Arnold Hewes.)

the rule about consistent statements is announced. It must have been five or six years ago, a case tried before Judge Fitzpatrick in the Superior Court.

Mr. Phelps: I can't remember. I have some recollection.

The Court: I do.

Mr. Murman: This witness has been interrogated by Mr. Phelps and he has gotten definite answers from this witness concerning oral statements made subsequent to this statement. Under those circumstances, whether or not he has produced the other persons, certainly at this time it would be within the rights of the Plaintiff to have him identify this statement as a prior consistent statement, for what it is worth, and then it is a question of weight. The question would be for the Jury [98] what weight the Jury wants to give it.

The Court: I understand that. Of course, everything is what weight they want to give it. On the other hand, I would like to read that rule myself. I have forgotten it. I will exclude it at the present time, without prejudice to your trying to put it in again if I should change my ruling.

Mr. Murman: Of course, I am up against this difficulty. This gentleman here is down from Redding and wants to get back very badly, and if I have to hold him, it makes it difficult in this regard, but I will bow to the Court's ruling.

Mr. Phelps: May I see the statement. Maybe we can agree on something.

The Court: I am inclined, in view of the con-

(Testimony of Raymond Arnold Hewes.)

venience of the witness to allow the statement in and then admonish the Jury to disregard it in the event I consider it shouldn't be admitted.

Mr. Phelps: If the Court please, I might say as far as that is concerned, I just intend to ask—I fully intend to ask the Court order this witness to remain until tomorrow because I have some things I am trying to find out about now that I want to interrogate him about.

The Court: All right, if that is what you are going to do then my ruling will stand until tomorrow. In the meantime, you can find that authority for me. I know they are all collated and that particular case I spoke—I can't remember the name [99] of it.

Mr. Murman: Do I understand that Mr. Phelps is going to call Mr. Hewes tomorrow as a witness?

The Court: He says he is going to ask him to remain until tomorrow.

Mr. Murman: I assume for the purpose of recalling him, then, tomorrow.

The Court: Yes. Is that so?

Mr. Phelps: Yes, if Your Honor please. There are some matters I am checking into. I have a long-distance telephone call about it, and I am about to ask the Court at the conclusion of this witness' testimony for permission to ask him to remain so that I may direct some further questions to him on cross-examination.

Mr. Murman: I have no further questions of the

(Testimony of Raymond Arnold Hewes.)

witness at this time, with the understanding that I still have this matter of the statement, Your Honor.

The Court: Yes:

Mr. Phelps: I was trying to see if there was anything we could agree on.

Mr. Murman: It is only for that one portion I am interested in at the moment.

The Court: Did I understand you to state, Mr. Phelps, you expect to show these so-called inconsistent statements made to the Coroner and to the Patrol Officer, and all that? [100]

Mr. Phelps: By testimony, yes, your Honor.

The Court: By testimony?

Mr. Phelps: Yes.

The Court: So that being the fact, this was given at a prior time, if that is your object I think then I will let the statement come in.

Mr. Murman: That is the purpose of the offer.

Mr. Phelps: My point, if your Honor please, is that this statement of course was prior to the one that is in evidence. The other statements which were made, I am frank in this position, that is the thing I want to find out, exactly when they were made. I think they will be determined to be prior to this statement which is in evidence, and I have a long-distance phone call. I want to address some other questions with respect to the same thing, and I think no harm can come from reserving ruling temporarily until tomorrow.

The Court: Of course, this witness is far away from home and comes down——

(Testimony of Raymond Arnold Hewes.)

Mr. Phelps: I can understand that.

The Court: —and it is close to Christmas. I don't want to keep him here unless I can't avoid it.

Mr. Phelps: I would be prejudiced if this witness did not take the stand again, I assure you.

Mr. Murman: My understanding of this witness' testimony was that he gave no oral statements subsequent to this particular [101] date. I will ask him a direct question.

Q. (By Mr. Murman): When you talked to the Highway Patrol people and the Coroner, was it after the time you talked to Mr. Whitfield?

A. I don't remember whether it was or not.

Q. You don't know?

A. No, not for sure.

Mr. Phelps: His recollection was that it was not, Your Honor.

Mr. Murman: Well, I didn't have that recollection as to his testimony.

Q. You don't know one way or the other on it?

A. No, I don't know. I wouldn't say one way or the other, because I don't know.

Mr. Murman: Well, my understanding of this witness' testimony was that he gave a couple of oral statements subsequent to this particular date. I have no further questions of this witness.

Mr. Phelps: I have none, if your Honor please. I should like an order requiring the witness to remain in attendance until tomorrow at 10:00 o'clock.

The Court: Will that inconvenience you very much?

(Testimony of Raymond Arnold Hewes.)

A. If you say to stay, I will stay. I would like to get gone, but it doesn't matter one way or the other.

The Court: All right, I will ask you to return at 10:00 o'clock tomorrow morning. [102]

A. Okay.

(Witness excused.)

Mr. Murman: Mr. Hewes can leave for the afternoon, can he?

The Court: Oh, yes.

JOHN L. DeROSA

a witness called on behalf of the plaintiff, sworn.

The Clerk: State your name, please.

A. John L. DeRosa.

Direct Examination

By Mr. Murman:

Q. Mr. DeRosa, you have appeared here pursuant to a subpoena which was issued by the plaintiff?

A. I have.

Q. Where do you live?

A. I live at the present time in, just about one mile out of Cottonwood.

Q. Where is that?

A. California.

Q. Near Redding?

A. It is approximately 16 miles south of Redding.

Q. About a year ago where were you living?

(Testimony of John L. DeRosa.)

A. I lived approximately six miles east of Redding out on Highway 44.

Q. Was that in the same locality that Mr. Hewes' lived? A. Yes. [103]

Q. What was your business at that time?

A. I worked for the Arrowhead Lumber Company in Anderson.

Q. Was that the same organization that Mr. Hewes worked for at the time? A. Yes.

Q. Do you recall December 27, 1948?

A. I do.

Q. Do you recall the morning of that day?

A. Yes, sir.

Q. Did you leave the place where you were living at that time on the morning of that day?

A. Yes, sir, just about our usual time.

Q. About what time was that?

A. Well, we would have left home just a few minutes right after 7 o'clock; maybe ten minutes or so.

Q. That was Daylight Saving Time?

A. Yes.

Q. And as you left home, did you notice whether it was dark or not? A. Yes, it was dark.

Q. How about the weather? Was it clear or rainy?

A. Well, it was kind of misty, and I wouldn't say it was really raining, but just kind of a general fog showing.

Q. Were you alone or with somebody when you left?

(Testimony of John L. DeRosa.)

A. I rode to work with my brother-in-law. We exchanged rides. [104] He would drive a certain number days, then I would drive so many days.

Q. On this particular day, you were riding with him? A. Yes.

Q. You were the passenger?

A. I was the passenger.

Q. Where did you go from your home in order to get to work that morning?

A. Well, we came across a shorter route, across the river to Anderson and came into Anderson from the north—northeast, really, it would be.

Q. That is a little town just south of Redding?

A. Yes.

Q. Did you have to use the headlights to come into Anderson? A. Yes.

Q. It was dark, was it? A. Yes.

Q. How about the windshield wiper?

A. Had to use the windshield wiper to clear the moisture off the windshield.

Q. When you got into Anderson, where did you go, what part of Anderson?

A. We came in Anderson from the east on North Street.

Q. Where did you go on North Street?

A. We usually crossed at North Street Crossing to get on the [105] main highway on the opposite side of the tracks.

Q. Did you go to North Street Crossing this day?

(Testimony of John L. DeRosa.)

A. Yes, we went to North Street Crossing and found that there was a freight train across the crossing.

Q. Are you familiar with this map? You have north to your right, south to your left, west to the top and east to the bottom. These six parallel lines represent three separate railway tracks.

A. Yes.

Q. Which of the three railway tracks was the freight train on? At the North Street Cross?

A. Well, I wouldn't be sure about it. I never paid special attention to it.

Q. You don't know which of the three tracks the freight train was on?

A. I believe it was on the far track, but my belief is just from general knowledge that that is the siding.

Q. The train engine was at a standstill was it?

A. Yes.

Q. How could you see the train there? How did you happen to see the train there?

A. I saw it more or less from the silhouette of it caused from the lights across the highway.

Q. On the other side? A. Yes. [106]

Q. This was the highway on the west side, is that right? A. Yes.

Q. From the headlights of the cars on that side, you could see the silhouette of the train?

A. Not so much the cars, you know, but there is a service station right across the street from the North Street Crossing, and the buildings also.

(Testimony of John L. DeRosa.)

Q. Did you notice anything else at that crossing at that time?

A. Yes, sir. There is a signal there with two red flashing lights off and on to warn traffic.

Q. Was it operating?

A. Yes, it was operating.

Q. Was there any bell ringing or was it just a light flashing?

A. Well, I never heard any bell.

Q. You never heard any bell? What did Mr. Hewes do after you and he arrived there in his automobile and found the freight train at the crossing?

A. Well, we pulled up there and he just paused for a moment, and then he swung to the left, that would be south on Center Street.

Q. On West Center Street? There are two Center Streets,—East Center Street?

A. That would be East Center Street.

Q. Yes. Did you go to the next crossing? [107]

A. Yes.

Q. What did you see there?

A. We saw the freight train, the tail of the freight train was across that crossing also.

Q. Did you see that tail of the freight train by the same means—

A. Yes.

Q. —as you saw the freight train up there?

A. Yes.

Q. The lights behind it, is that right?

A. Yes.

(Testimony of John L. DeRosa.)

Q. It was still dark when you were at this crossing, was it? A. Yes, it was still dark.

Q. Then what happened?

A. Well, we came on down south, down East Center Street to come across one of the other crossings.

Q. Did you notice anything in the way of an automobile ahead of you as you came down East Center Street? [108]

A. Yes, we pulled up behind a coupe just as we were coming near the Howard Street crossing.

Q. Will you come down to the board, Mr. DeRosa, and mark on this map about where you remember seeing the coupe for the first time?

A. (Leaving witness stand): Well, I would say approximately right in here some place (indicating).

Q. We will put a cross there. Is that right there? A. Yes.

Q. We will call that "D-1." What is your best recollection as to where the car you were riding in was at the time you saw the coupe at D-1?

A. Well, we were up fairly close behind him.

Q. Will you make a mark where you recall your car to be?

A. Well, somewhere right in here (indicating).

Q. "D-2." Now, what happened to the car that you first noticed at D-1, where did it go?

A. Well, it proceeded on to this crossing here and stopped at the stop sign.

(Testimony of John L. DeRosa.)

Q. Will you make a mark where you remember it stopped at the stop sign?

A. Well, this is the edge of the right of way, is that right?

Q. About where? I am not sure.

A. It would be just approximately right in this locality right here (indicating). [109]

Q. Use the red pencil and make a mark.

A. A cross?

Q. Yes.

A. It would be approximately right there.

Q. Call that "D-3." Where did the car that you were in go after the car ahead of you came to D-3?

A. We pulled up right behind him and stopped with possibly ten feet between our car and his.

Q. Will you make a mark where your car stopped?

A. It would be right in here some place (indicating).

Q. Call that "D-4." Now, you say that the car ahead of you stopped at the stop sign. Which side of the crossing was the stop sign on?

A. It would be on the east side of the tracks on the right-hand side of the crossing.

Q. Will you make a mark about where you can recall a stop sign?

A. It would be right in here, about (indicating).

Q. Call that "D-5." Now, had you been across that crossing before?

A. Well, yes, many times.

(Testimony of John L. DeRosa.)

Q. Can you tell us whether or not, on the day that we are speaking of, December 27, 1948, whether or not there was a wig-wag signal there any place?

A. Well, I can only tell you by times that I had seen it previously. [110]

Q. Well, where did you see it previously?

A. It was approximately right here on the north side of the crossing (indicating).

Q. Will you put an "X"?

A. Right in there (indicating).

Q. "D-6." All right, will you sit down, Mr. DeRosa?

(The witness resumed the witness stand.)

Q. Now, how long did the car ahead of you remain stopped at D-3, so far as you can recall?

A. Well, he stopped there for just a little while, just a moment or so, long enough to reach forward and clear some of the mist off the inside of his windshield. I imagine it would be, oh, I am a very poor judge of time.

Q. Did you see him clear the inside of his windshield?

A. Yes, I could see it, could see the silhouette—well, it would be the silhouette of him through the car from the lights on the other side.

Q. Did you do anything similar in your car?

A. Yes, Mr. Hughes was wiping the windshield off and I also wiped the side in front of me off.

Q. When you saw the man ahead of you wiping his windshield, was it before or after you had wiped the windshield in your car?

(Testimony of John L. DeRosa.)

A. Well, it was probably before.

Q. Did the car that had stopped at D-3 move forward before you finished wiping your windshield? [111]

A. Well, I don't think it did. He stopped and didn't seem to be in any particular hurry to go ahead and proceed. He took quite a bit of care in wiping it off.

Q. Would you say this, that he was there as long as you were stopped behind him?

A. Well, I believe we started forward at just about the same time; well, just maybe just a moment after he did.

Q. He had already come to a stop before you drew up behind him, is that correct?

A. Yes.

Q. As you stood there, or as your car was stopped there, you were seated on the right of the driver, weren't you?

A. On the right-hand side.

Q. Did you look forward across the railroad tracks to the west Center Street side of the crossing at all? A. No, I don't remember doing so.

Q. As you were seated in the car, were you looking through the windshield?

A. Yes, I was looking at the car and general surroundings.

Q. That would be, when you say "general surroundings," where do you mean? In the vicinity of the car and beyond?

A. In the vicinity of the car, yes.

(Testimony of John L. DeRosa.)

Q. As the car ahead was started up—it did start up, didn't it? A. Yes. [112]

Q. Did it go forward gradually or did it start up quickly?

A. No, it seemed to just move forward gradually, like he would have it in the first gear.

Q. Have you any way of estimating the speed of the car as it went forward?

A. Oh, I would say it didn't go over, oh, five miles an hour.

Q. And did Mr. Hughes follow along behind him?

A. Well, we pulled ahead just, oh, maybe 25 feet past the position where he had stopped.

Q. The car that you were in went forward and came a little bit past or past where——

A. Where we had pulled up.

Q. ——the car ahead of you had been?

A. Yes, we pulled up a little bit behind where he had stopped.

Q. Have you any way of telling us the distance, how far that would be, when you say "a little bit"?

A. Well, possibly the length of a car.

Q. Could you step down here again and mark the position of Mr. Hughes' car when you came to the second stop after the car ahead of you had gone forward?

A. (Leaving witness stand): Yes, we stopped right in this vicinity here.

Q. We will call that "D-7." When you were

(Testimony of John L. DeRosa.)

stopped at D-7, where was the car that had been ahead of you?

A. Well, it was still going in front of us, going on across the [113] tracks, across the crossing.

Q. About how far ahead of you was it, would you say? Can you estimate it in car lengths?

A. Well, it was probably two or three car lengths, something like that.

Q. And did it proceed along at about the same speed? A. Yes.

Q. Same speed you have mentioned, about five miles an hour?

A. Yes, about five miles an hour.

Q. Did you watch it?

A. Yes, I watched it all the time.

Q. What happened?

A. Well, he just went right on across the crossing, and just as his car got right across the main line I noticed the train come down the track.

Q. What did you see of the train as it was coming down the track?

A. I saw the headlight first, and then just almost instantly I saw—I heard the horn or whistle, whatever they have, I don't know which it is, blow.

Q. At that time you were at D-7, as you have marked it? A. That is right.

Q. Is there anything you can tell us about where on the track the train was when the whistle blew? Have you any way of telling us that? [114]

A. Well, I would say it couldn't have been

(Testimony of John L. DeRosa.)

possibly over 200 feet up the track from the crossing.

Q. Well, is 200 feet about your judgment?

A. Yes.

Q. Is there some way that you could—well, let me ask you this question: As you were here and saw the headlight beam, about where in the track did you see the beam first?

A. Well, kind of hard to say. I would say just almost opposite the depot, right in here (indicating).

Q. Will you make a mark there? We will call that "D-8." That is where you first saw the beam, is that right? A. That is right.

Q. Was it passing that point that you heard the whistle?

A. Yes, just an instant, almost at the same time.

Q. Do we understand that is about where the front of the engine was when you heard the whistle?

A. Yes.

Q. Referring now to D-8, this mark that you have made—— A. Yes.

Q. How much time elapsed, if you can give us your judgment, of the time, between the time you heard the whistle at this point, about D-8, and the time the collision occurred?

A. Oh, well, as I said before, I am an awful poor judge of time. I don't know.

Q. Was it a short interval or long interval?

A. Just an awful short interval.

Q. Awful short interval? A. Yes.

(Testimony of John L. DeRosa.)

Q. Would you say it was an instant?

A. Well, probably an instant.

Q. Could you give an estimate of the speed of that train?

A. Well, I estimate it to be exceeding 60 miles an hour, anyhow.

Q. Up to the time you had seen the headlight at D-8 and the whistle at that point, had you seen anything in this vicinity to indicate a train was coming?

A. No.

Q. Did you look in the direction, as you moved from where—as you moved from the point where you first came to a stop at D-4 to the second point at D-7, did you look across the intersection at all?

A. I don't remember doing so, no.

Q. Were you standing looking forward at the automobile?

A. Yes.

Q. Did you see anything in motion in the vicinity of D-6 at that time?

A. I never, no.

Q. Did you see any lights in the vicinity of D-6 at that time?

A. No.

Q. You didn't? [116]

A. No, I never.

Q. Now, after the—you can go back to the witness chair.

(The witness resumed the witness chair.)

Q. After the collision occurred, what did you do, remain in the car or did you get out?

A. I remained in the car.

Q. Where did the car go, or did it move?

A. I didn't quite follow you.

(Testimony of John L. DeRosa.)

Q. Did the car remain at this point, at D-7, as you marked it, or did it move from that point?

A. I understand you are referring to our car?

Q. Yes, that is right.

A. We remained right there.

Q. How long?

A. Well, just long enough for the train to clear the crossing.

Q. The train cleared the crossing?

A. Yes.

Q. Did it stop down the line somewhere?

A. Well, at first, I didn't think it stopped, but later I looked down the track and saw it.

Q. You could see the rear of it, could you?

A. Yes.

Q. When the collision occurred, was it still misty? A. Yes.

Q. And was the windshield wiper still going on your car? [117] A. Yes.

Q. How about the headlights; were they still on?

A. Well, the headlights were still on.

Q. Referring to the car ahead of you, was there anything lighted on that car?

A. Well, I never paid special attention. I do remember the tail light being on. I also remember the tail light being on after the collision when we went over to the wreck.

Q. You saw a tail light on the car after it was wrecked? A. Yes.

Q. "Burning" when you say "on," is that right?

A. Yes, burning, lit.

(Testimony of John L. DeRosa.)

Q. By the way, did you know who was driving the car at the time of the collision? A. No.

Q. Did you know Mr. Shanahan before the collision? A. No, I didn't know him.

Q. Or his wife, Mrs. Shanahan?

A. No, I didn't know either of them.

Q. After the train cleared the crossing and stopped down the line, as you said, did the car in which you were riding move forward?

A. Yes, we moved forward at a slow rate of speed and crossed the tracks and stopped again.

Q. And then what did you do? [118]

A. Well, both I, my brother-in-law, jumped out of the car and ran down the tracks to see if we could render any assistance to the occupants.

Q. And what did you see down the tracks?

A. We first came to a—the body of the man that we later learned was Ellis Shanahan.

Q. And did you check his pulse, or anything?

A. Well, my brother-in-law, Raymond Hughes, checked his pulse and said he couldn't feel any pulse, and I, myself, gathered up some of the papers and his wallet that had been thrown out there on the tracks, gathered it up and laid it beside the body.

Q. Did you note whether he was breathing or not?

A. He wasn't breathing, to my knowledge.

Q. Now, did you go past the body to where the car was? A. Yes.

(Testimony of John L. DeRosa.)

Q. By the way, which side of the main track did you find the body on?

A. Well, it was on the west side between the tracks and the highway.

Q. And do you know about how many feet beyond the crossing it was? Have you any idea?

A. Well, I would estimate it at approximately a hundred and twenty feet, something like that.

Q. And how about the wreck? About how much further beyond the body was it? [119]

A. Oh, approximately twenty or thirty feet farther.

Q. I show you Plaintiff's Exhibit 7 in evidence, and ask you if that is a picture of the wrecked automobile? A. Yes.

Q. And it was on that wreck that you still saw the tail light burning, is that right? A. Yes.

Q. Now, after you viewed the wreckage of the car, what happened? Did you do anything further?

A. Well, we decided—well, we looked in the car to see if there was anybody else in the car and there wasn't, so we decided we couldn't be of any assistance, and we were supposed to be at work at eight o'clock, so we went back and got in our car and went on to work.

Q. Can you tell us about what time the accident occurred?

A. Well, I would say about twenty minutes to eight.

Q. And at the time, was it still dark?

(Testimony of John L. DeRosa.)

A. Yes, it was pretty dark.

Q. And when you say twenty minutes to eight, you are referring to daylight saving time?

A. Daylight saving.

Q. Now, I show you Plaintiff's Exhibit 3—this is in evidence, isn't it, Mr. Clerk?

The Clerk: Yes, sir.

Q. (By Mr. Murman): Plaintiff's Exhibit 3 in evidence, and [120] ask you if you can identify that photograph? A. Yes.

Q. About from what point was that picture taken, if you can tell us?

A. It would be approximately what you would see if you stopped at the stop sign on the east side of Howard Street crossing and looked north.

Q. And will you—you are now referring to this mark you made here at D-3, where the car ahead of you stopped, is that right?

Mr. Phelps: Now, I will object to the last one, if your Honor please. I didn't object to the first one. The place was designated; he can't express the opinion of the driver, what he could have seen——

The Court: I don't think he made that statement.

Mr. Phelps: Where he stopped, I thought, was the purpose of the question.

The Court: Read the question.

(Question read.)

The Court: I think I will allow the answer. It

(Testimony of John L. DeRosa.)

is a repetition of the previous answer. Are you going to be much longer with the witness?

Mr. Murman: No, I think that he is now ready for cross-examination, Judge.

The Court: I don't want to hurry you.

Mr. Murman: I was just turning it over to cross-examination. [121]

The Court: We will take a recess.

Take a recess, ladies and gentlemen, for ten minutes. In the meantime, bear in mind the admonition that I have heretofore given you.

(Short recess.)

Q. (By Mr. Murman): I have just one question. Mr. DeRosa, did you see any flagman around that crossing on that morning?

A. No, I didn't.

Mr. Murman: No further questions.

Cross-Examination

By Mr. Phelps:

Q. Mr. DeRosa, you left your home after arriving. About how far is your home from the scene of this accident?

A. Well, I would say approximately nine miles.

Q. And, I take it, Mr. Hughes picked you up, and after picking you up, you went straight to the place where the accident happened? A. Yes.

Q. And your place is from east and north of Anderson? A. That's right.

(Testimony of John L. DeRosa.)

Q. And you came in on North Street, is that right? A. That is right.

Q. You were driving, then, as you came into Anderson, you were driving west on North Street?

A. That is right. [122]

Q. Until you came to the intersection of that North and Center Streets? A. That is right.

Q. Now, then, you continued on after observing the crossing was blocked by a freight train, you continued then turning to your left and went down Center Street? A. Yes.

Q. In a southerly direction? A. Yes.

Q. You didn't stop and wait at that crossing, you simply turned and went on down Center Street?

A. We paused momentarily at North Street crossing.

Q. What I mean, you didn't stop and wait?

A. We didn't stop and wait.

Q. For the train or for the other train to clear; you simply turned, did you not, after pausing?

A. Yes.

Q. Did you come to a full stop or slow down and turn?

A. Well, I believe we just paused momentarily. He undoubtedly put the car in low gear to start again.

Q. But you didn't come all the way up to the tracks and have to back up and turn around?

A. No, not that as I remember it.

Q. And you turned left and then continued on

(Testimony of John L. DeRosa.)

down south on Center Street; you didn't turn into the crossing at Ferry [123] Street, did you?

A. Not that I remember.

Q. You could see that the freight cars were across Ferry Street without turning into Ferry Street and directing your headlights on them?

Mr. Murman: Is that a question?

Mr. Phelps: Yes.

The Witness: You want me to answer that?

Mr. Phelps: I will rephrase it again.

Q. You didn't—you did not turn into Ferry Street? A. Not that I remember.

Q. And you did see the freight cars still blocking Ferry Street without turning in?

A. Pardon?

Q. You observed the freight cars still blocking Ferry Street?

A. I observed the freight cars still obstructing the crossing.

Q. Yes. Then you continued on down here past the depot and then you saw the car which later you learned was driven by Mr. Shanahan, and at the point which you have identified as D-2; is that correct? I am now pointing to the place where the car was, or is that where you were?

Mr. Murman: Better have him come down and look.

Q. (By Mr. Phelps): I think it was D-1. You tell me where it was. Let me see what my notes say.

(Testimony of John L. DeRosa.)

The Witness: Mr. Shanahan's was where it is marked D-1. [124]

Q. Marked D-1.

A. Our car was marked where it is D-2.

Q. Now, you didn't see Mr. Shanahan's car before you reached this point, D-2?

A. I think not.

Q. And at that time—will you draw the diagram to indicate, a rectangle, to indicate the direction which your car was headed and the front end of it, and where it was? See what I mean? I mean, draw a rectangle, indicating the car.

A. You want me to draw that on the map?

Q. Yes, right on the map.

A. I would estimate his car——

Q. I say yours.

A. I am sorry. Well, I would estimate our car was just about like this (indicating).

Q. And what is your estimate of the distance from the front end of your car to the front end of his car at the time you first saw—to the rear end of his car, when you first saw it?

A. Well, not——

Q. In feet, if you can.

A. We were up rather close. I imagine it would possibly be fifty feet, or so.

Q. All right. Now, for the record, Mr. Murman, the witness did draw a parallelogram across D-2. You can take the stand again, if you will, please. You will be more comfortable. [125]

At the time, Mr. DeRosa, that you saw the

(Testimony of John L. DeRosa.)

Shanahan car, did you observe its speed at that time as it was going along?

A. I didn't observe just what—just exactly how fast it was going, no.

Q. And at that time, at the time you saw it, had it yet—withdraw that. At the time you saw it, when you first saw it, had he yet made his right-hand turn into the crossing street?

A. No, I don't believe he had.

Q. All right. A. Otherwise——

Q. You saw him make that turn——

A. To add a little bit to the statement I just made, he wouldn't—his car wouldn't come squarely parallel with Center Street making that, had just kind of made a sweeping "S."

Q. You mean making a sweeping "S" out of Howard Street and turning left, and then turned right into the Howard Street crossing?

A. Yes, assuming he came out of Howard Street, yes.

Q. Well, you didn't see him before the point where you saw him?

A. I don't know that he came out of Howard.

Q. You don't know one way or the other?

A. No.

Q. Your brother-in-law, you testified you saw it before he did, is that right?

Mr. Murman: I will object to what his brother-in-law [126] testified——

Q. (By Mr. Phelps): You don't know when he saw the car? A. No.

(Testimony of John L. DeRosa.)

Q. As far as you are concerned, you don't know where it came from?

A. I don't know where it came from.

Q. All you know is that you had come a distance of two blocks on Center Street and you didn't see it at any point down those two blocks on Center Street?

A. I did not.

Q. And you didn't see it, then, until you came into the intersection of Center and Howard?

A. Well, it—yes, that would be approximately right.

Q. I assume you were paying attention to where you were going, weren't you, as you were going down those two blocks?

A. Well, yes.

Q. And you were looking forward through the windshield?

A. Yes.

Q. Now, as the car driven by Mr. Shanahan came to a stop, can you locate the place where that car stopped with reference to the incline there at the crossing?

A. Well, I believe that he stopped right at the foot of the incline.

Q. You mean—pardon me, had you finished?

A. Yes. [127]

Q. You mean by that, the front end of his car was at the bottom of the incline?

A. Yes.

Q. And so that, without regard to any other physical obstruction or any other mark you might have put on the map, your recollection there and then at the time when you observed him was he

(Testimony of John L. DeRosa.)

stopped with his front end at the bottom of this little incline? A. Yes, approximately that.

Q. And that it was only after he stopped that he went up this incline to reach the grade and level of the tracks? A. Yes.

Q. In other words, when he stopped, so it will be perfectly clear, his car was on the level of the grade of Center Street itself? A. Not exactly, no.

Q. Well, it was still at the bottom of that little incline and hadn't yet gone up the grade off of Center Street, isn't that right? A. Yes.

Q. All right. Now, you came to a stop behind him, is that right? A. Yes.

Q. When you came to a stop behind him, you were directly behind him, was your car headed in the same direction as his [128] car, or was it at an angle with his car?

A. Well, we would be in somewhat of an angle to him.

Q. Suppose you come down to the board, then, and draw in the two cars as they were both stopped, yours beside the Shanahan car and the Shanahan car before he went over the crossing? Will you draw that in?

(Witness at the blackboard.)

Q. Now, I don't know how to ask you to do that with all these other marks on the board. Suppose you take a regular lead pencil and do it.

A. Well, I believe the car would be bigger than I am drawing here.

(Testimony of John L. DeRosa.)

Q. I think it would. Do you want to make a—do you want to make it a little bigger, then?

A. Something like that (indicating).

Q. All right. Well, now, I think it is apparent that it isn't drawn accurately to scale, but, at any rate, the points that you have indicated, the relative—I may have to darken it—this relative position—these relative positions of these two cars as they were stopped, and this is in lead pencil, and I will draw an arrow to—let's see. This will be D-9.

Mr. Murman: That's right.

Q. (By Mr. Phelps): And that will indicate the position of the Shanahan car as it stopped, and we will draw this D-10 and make it the position of your car after it stopped behind [129] the Shanahan car, and we understand it isn't drawn exactly to scale, but can you say that the front end as it is indicated there, the approximate position of the front ends of the two cars?

A. The front end of it would be approximately—I might have made just a little mistake in the tilting of it somewhat; I don't know.

Q. What do you mean by that; the angle in which they were in the street? A. Yes.

Q. Well, if there is any mistake, why not correct it now? Can you tell us in which respect and which ones?

A. Well, his car would probably have been tilted more, since he was coming in from the right.

Q. Just the—draw the approximate angle it was and in the street.

(Testimony of John L. DeRosa.)

A. Well, it would be tilted a little bit more so (indicating).

Q. You mean it would be heading a little bit more——

A. Yes.

Q. ——south?

A. Yes. The front end would be a little more south.

Q. A little more south; and you have indicated it there?

A. Yes.

Q. He hadn't yet straightened up yet and wasn't yet parallel with Howard Street. Now, I am talking about the Howard Street crossing, not Howard Street on the other side. [130]

A. He wasn't quite parallel with the crossing.

Q. Thank you. Sit down, then, Mr. DeRosa. Now, after he started up, he never came to a stop until he was hit, is that right? [130-A]

A. That's right.

Q. Did he slow down at any time?

A. No.

Q. Did he speed up at any time?

A. No.

Q. Did he just maintain his speed that he acquired after having started up, is that right?

A. Yes, sir.

Q. And can you estimate that speed for us?

A. Approximately five miles an hour he was traveling.

Q. Now, how long—you have estimated it, you said, you were not a good judge of time, so I think you said you thought he was stopped there about a

(Testimony of John L. DeRosa.)

minute, but is it fair to say this: That in any event, he was stopped the length of time that it took him to do the acts that you have described, namely, the wiping of the front windshield?

A. Well——

Q. Whatever the length of time that took?

A. A man as cautious as he was——

Mr. Phelps: Well, now, I will ask that go out and ask that the question be answered.

The Court: It will be stricken.

Mr. Phelps: Thank you, your Honor.

Q. Can you answer my question? I will re-frame it. My question is: You say that it is a little difficult for you to judge [131] time. I am trying to fix it for you another way and would you say——

A. It isn't difficult for me to judge time. I referred to distance.

Q. Oh, I see—after I believe. In any event, whatever that time takes to perform what he did, what you said, that is about the time he was stopped. Is that right?

A. I would say possibly he stopped there a minute.

Q. All right. A. Or so.

Q. And you came up right behind him as he stopped, did you? A. Yes.

Q. Had him under observation the entire time from the time you first saw him at the point D-1 until he did come to a stop? A. Yes.

Q. Now then, after he started out, what did your car do?

(Testimony of John L. DeRosa.)

A. Well, we parked just momentarily, and then started up following up behind him.

Q. You followed him around, followed him over the crossing, is that right? A. Yes.

Q. And did you thereafter come to a stop before the collision?

A. Yes, we came to a stop before the collision.

Q. And was that also at the bottom of the grade, or was it still a little farther up? [132]

A. We drove up on the grade a little ways.

Q. About how far up the grade?

A. Well, possibly a car length or so.

Q. What do you mean by a car length, an automobile length? A. That's right.

Q. About twelve or fifteen feet? A. Yes.

Q. Beyond and west of the place where he stopped? A. Yes.

Q. And then you came to a stop there, is that right? A. Yes.

Q. How long were you stopped there?

A. Well, due to the stress we was under, I couldn't say.

Q. All right. At any rate can you say this: In relation to the time of events, had you started up at the time when you first saw the headlight of the locomotive of the engine?

A. I believe that we were moving when I saw the headlight and heard the whistle.

Q. And how far had you proceeded from your stop, that is, your second stop, from the stop until you heard the whistle or saw the light?

(Testimony of John L. DeRosa.)

A. In reference to the second stop, what do you mean there?

Q. Well, as I understood it, you made a stop back here behind the Shanahan car and then went up a grade about twelve or fifteen feet and stopped again? [133] A. Yes.

Q. And then you had started up before you saw the train?

A. No, we saw the train before we stopped.

Q. You saw the train before you made the second stop?

A. Just—oh, maybe an instant or so before we stopped.

Q. I see. So then, so that we are clear, now you had stopped behind the Shanahan car, the position marked D-10? A. Yes.

Q. The Shanahan car started up and went over the crossing without stopping? A. Yes.

Q. And after it started up, you started up and started to cross the crossing and didn't stop again until you saw the train and that was what caused you to stop; is that right?

A. Well, I wasn't driving the car, and I don't remember exactly whether it was my saying something to my brother-in-law about the train or what it exactly was it made him stop.

Q. I see.

A. But he stopped there after I saw the train.

Q. Whether it was because you said something to your brother-in-law or because your brother-in-law saw the train, in any event, you didn't stop your

(Testimony of John L. DeRosa.)

automobile again until after you had seen the train?

A. After I had seen the train, yes.

Q. And you didn't do this: So that we are absolutely clear, [134] I don't want to be mistaken; you didn't then after having started up stop a second time back at the same point where the Shanahan car stopped and then proceeded on again and then come to a point, a third stop after you saw the train?

A. No, we made just the two stops on this side of the tracks.

Q. All right. And when you saw the train—how far did your automobile move after you saw it?

A. Well, I wouldn't exactly know just exactly.

Q. Well, give your best estimate, give it as close as you can and follow very frankly as close you think you can come to it?

A. It was just an instant.

Q. Was it a matter of feet, ten feet, or three or four feet, or only one foot? I know that you can't be exact, and I am not holding you down to that, but we want to know approximately how far?

A. I don't think that we went over half a dozen feet.

Q. All right.

A. After I saw the train until we stopped.

Q. And when you first saw the train—and that was the first thing you saw, was the headlight, is that correct? A. Yes.

Q. And as you saw that headlight, that was as

(Testimony of John L. DeRosa.)

you came, as it came into your view beyond the station, is that correct?

A. Well, I don't know if I would put it that far up the track, but as I said before, when I saw the train, I judge it was only a couple of hundred feet up the track and—when I saw the light. [135]

Q. When you saw it—I want to have it exactly—how far up the track was it? Now, I am trying to have your memory this way: You said you saw the light as it came into view as you drove up here and as the station then became more behind you and the locomotive then came in evidence when? Beside the station? Do you understand what I mean?

A. I understand what you mean, but I didn't pay any attention in reference to the depot.

Q. All right, so that you just can't answer that?

A. No.

Q. You can't help us on that? All right. At any rate, you did hear a whistle or horn?

A. Yes, I heard a whistle or horn, whatever they have.

Q. And was that almost at the same time that you saw the headlight?

A. Well, it was just momentarily after, just a short interval after I saw the light 'til I heard the whistle or horn.

Q. Was it a matter of a second or so?

A. Well, yes.

Q. And did it make a continuous whistle or was it a short blast, or what? A. Yes.

Q. What? A. Well, I don't know—

(Testimony of John L. DeRosa.)

Q. So far as you can now remember? [136]

A. Just one long blast as it went by.

Q. All right. Now then, so that your memory after you came to a stop ten or twelve, twelve or fifteen feet up the incline after the train was observed by you, did you remain stopped until after the train cleared the crossing? A. Yes.

Q. And at the time you stopped, how far ahead of you was the Shanahan car?

A. Well, I would say thirty-five feet.

Q. And at the time you stopped there, had there been an impact?

A. I don't exactly remember whether we stopped before the train hit or not.

Q. Can you tell me where the Shanahan car was when you first saw the headlight?

A. Well, I wasn't looking at the car when I saw the headlight. I was looking out the side of the side window and when I looked around the next time I saw the car as I saw the headlight, that is, it seemed to me like it was right over the main line right in front of the train.

Q. Was that before or after the collision?

A. That was before the collision.

Q. How far was the engine from the automobile at that time? A. Well, I couldn't say.

Q. And at that time, I take it from the very moment that you [137] saw the headlight up until after the accident and after the train cleared the crossing, your entire attention was occupied by

(Testimony of John L. DeRosa.)

the events of seeing this locomotive coming and watching the car?

A. Well, my whole attention was centered on the car. I didn't especially pay any attention to the train until it came into my line of vision directly in front of me.

Q. All right, so you were watching the car the entire time before you saw the train, and after you saw the train, you were watching the train and the car?

A. Yes.

Q. And you weren't watching anything else?

A. No.

Q. All right. Now, when you say that—did I understand you to say that you didn't think that the train was going to come to a stop?

A. Yes.

Q. Think back. Isn't it a fact that you actually remember seeing sparks fly from the wheels because the brakes were set on the train at the crossing?

A. I actually saw a spark, but I imagined it was from part of the wreckage under the car that was throwing the sparks.

Q. Didn't you see it was sparks from the brakes?

A. I couldn't say truthfully that they were the sparks from the brakes. I wondered at the time what they were from. [138]

Q. I see. Well, you have seen, haven't you, trains coming down grades and brakes set and sparks flying?

A. No, I haven't.

Q. You haven't? Well, is it your testimony then,

(Testimony of John L. DeRosa.)

that you would say that you did not observe sparks that were coming from the brakes of the cars?

A. Yes.

Mr. Murman: He has testified he has never seen sparks coming from brakes. That is a pure conclusion, if the Court please.

Q. (By Mr. Phelps): Now then, so far as you are concerned, you are not telling us anything other than what you heard or saw, isn't that correct?

A. That is right.

Q. You don't know of your own knowledge whether or not any further or other whistles were sounded by this locomotive other than the one that you heard, is that correct?

A. I never heard any.

Q. All right, and you are not telling us now, not meaning to say that no other whistles were sounded?

Mr. Murman: That is calling for a conclusion of the witness, if the Court please. How can he say whether another whistle was sounded if he only heard one whistle?

Mr. Phelps: I am qualifying it.

The Court: He already stated that. He said he never heard [139] any other.

Mr. Phelps: That is exactly what I am getting at.

Mr. Murman: That is the reason for my objection.

Mr. Phelps: I think I am entitled to go into that.

Mr. Murman: You are not entitled to ask the

(Testimony of John L. DeRosa.)

witness to answer a question he knows nothing about.

Mr. Phelps: Well, I submit my question.

The Court: I think the question was asked and answered. He said he only heard that one whistle.

Mr. Murman: I didn't think he had given any answer to that last question.

The Court: Well, read the question, Mr. Reporter.

(The question was read by the Reporter.)

The Court: You can answer that question.

A. Would you mind framing the question again?

Mr. Phelps: I think I can, yes. Don't answer until your Counsel has a chance to object.

Q. Mr. DeRosa, my question is simply this: You are telling us what you did see and what you did hear, and you are not now telling us by your testimony that the horn or whistle was not sounded on any other occasions than the one you heard?

Mr. Murman: I submit, if the Court please, if he only heard one whistle, how can he tell whether there was blowing on any other occasion?

The Court: He is not asking that. He is simply asking [140] if it was only once that he heard the whistle.

Mr. Murman: If that is the question, I have no objection to him answering.

A. It was only once I heard the whistle.

Q. (By Mr. Phelps): All right. How long did you stay at the scene of the accident?

(Testimony of John L. DeRosa.)

A. Well, I don't imagine we stayed there over six or seven minutes.

Q. This was after you drove up and crossed the crossing and went over as you have described it to us? A. Yes.

Q. Then later you came back, is that correct?

A. Yes.

Q. How long afterwards was it that you came back?

A. Well, I couldn't say about that. I never carry a watch.

Q. Half an hour, an hour, what?

A. I believe it was longer than that.

Q. Your best estimate?

A. We went to work and the Foreman told us we might as well go back home, we turned around, got in the car and drove back to the scene of the accident. I imagine it was an hour at the least.

Q. When you got back, had Mr. Shanahan been taken away in the ambulance? A. No. [141]

Q. He was still there? A. Yes.

Q. How long did you remain there on this second occasion?

A. Oh, we remained possibly ten minutes or so.

Q. By the time you left the second time, had Mr. Shanahan then been taken away? A. No.

Q. Had any preparations been made to start to take him away; in other words, had he been lifted on the stretcher and was he being lifted into the ambulance at that time?

A. Well, I believe there was some "diffewculty"

(Testimony of John L. DeRosa.)

about which funeral parlor was going to take care of him.

Q. I see, but nothing yet had been done about that? A. No.

Q. Were there any officers there that you saw?

A. There was a Highway Patrolman.

Q. And do you know who he is?

A. No, I don't know him.

Q. Can you describe him?

A. No, it has been too long ago.

Q. Was he in the uniform of a State Highway Patrolman? A. Yes.

Q. And was the Constable there, if you know?

A. I don't remember of seeing him, no.

Q. You don't remember seeing him? [142]

A. No.

Q. You didn't talk to him at the scene of the accident, the Constable? A. No.

Q. Do you know the name of the Constable?

A. You mean at Anderson?

Q. Yes.

A. I believe his name is Dewey Casebeer.

Q. You didn't have any conversation with him?

A. No.

Q. Now, on the question of visibility at the time of the accident, you said it was pretty dark, is that right?

A. Yes, it was dark enough that you needed your headlights pretty bad.

Q. And was day breaking?

(Testimony of John L. DeRosa.)

A. Well, as I remember, I don't know for sure. It might have just been, just barely breaking.

Q. The gray light of dawn, is that right?

A. Well, I don't know what you mean, how dense you mean.

Q. Well, I am not now concerned with atmospheric conditions, Mr. DeRosa, but I am trying to find out the best I can from you because you were there.

A. It was just breaking dawn.

Q. It was just breaking dawn? A. Yes.

Q. By that, so that I can understand, the sky wasn't black as it is at night. It had started to break dawn and there was light in the sky?

A. I don't remember whether there was light in the sky or not. I remember it was misty and I believe it was just breaking dawn.

Q. Breaking dawn?

A. I don't believe there was enough light to amount to anything from the dawn.

Q. Well, it was sufficient, so that you could see the silhouettes of buildings, couldn't you?

A. Well, I don't remember exactly whether I could or not.

Q. You don't remember? Could you see the silhouettes of trees?

A. You are referring to against the sky?

Q. Yes.

A. Well, I don't believe you could.

Q. It was overcast, wasn't it?

A. Yes.

Q. And had been raining that night?

(Testimony of John L. DeRosa.)

A. Well, I don't know. I don't remember whether it had been raining or not. It was a kind of misty morning. I guess you could call it small raindrops.

Q. But hadn't it been raining rather heavily that night?

A. I don't remember whether it had or not.

Q. You don't remember whether there were puddles of water [144] around this crossing?

A. No.

Q. I mean real puddles. Deep puddles. Not made from mist.

A. I don't exactly remember seeing any puddles, no.

Q. Do you remember whether the roads were wet from rain or not?

A. The roads were wet, yes.

Q. Do you know whether or not that was from the rain of the night or don't you know one way or the other, tell me?

A. Well, I assumed it was from the mist that was falling there in the morning. [145]

Q. But it could have been from the rain, is that right?

Mr. Murman: No, that is not the witness' testimony. You are trying to put words in his mouth.

Mr. Phelps: I am trying to get the witness to answer the question "Yes" or "No."

The Court: Don't argue about it. Proceed and answer the question. Read the question.

(The question was read by the reporter.)

(Testimony of John L. DeRosa.)

The Court: That is assuming it had been raining.

Mr. Phelps: Exactly.

A. Assuming that it had rained, it could have been from the rain.

Mr. Murman: That is a purely hypothetical answer, if the Court please, and I move it be stricken.

The Court: I don't think it makes any difference whether it rained or not. The witness has already said he doesn't know whether it rained or not.

Mr. Murman: I can't see the materiality of it, either.

The Court: If there had been a rain, then it might have been from the rain. That's like saying I would have had ham and eggs for breakfast if I had some eggs.

Mr. Phelps: I think, if Your Honor please, we can establish it did rain that night. We have pictures of puddles, and so on.

The Court: I don't care what you could establish now. [146] He may have been asleep.

Mr. Phelps: Absolutely.

The Court: I have been asleep while it rained.

Mr. Phelps: Unquestionably; but I thought it would be proper to question him about it and I still think it is. All right.

Q. (By Mr. Phelps): Now, then, can you tell us whether or not before you left the scene of the accident it got lighter or whether it remained just as dark as it was before?

A. Well, I believe it got just a little bit lighter.

(Testimony of John L. DeRosa.)

Q. And can you tell us whether or not the visibility before you left was such that you could see objects, see the automobile down the crossing, and so forth, from the crossing?

A. Well, I don't believe you could see it very well from the crossing.

Q. But you could see lights? A. Pardon?

Q. I say, you could see lights? This mist—let's get into this mist—it wasn't so thick like a fog that it obscured or blocked lights?

A. You could see lights, yes.

Q. It wasn't fog so that it obscured and blocked out lights?

A. It didn't block out lights at a relatively short distance, no.

Q. And it did not block out the lights across the road? [147] A. No.

Q. Didn't block out the headlights of the cars on Highway 99?

Mr. Murman: You mean at the crossing, Mr. Phelps?

Mr. Phelps: No. As he was coming down, he said there were cars going down Highway 99 and he could see the headlights.

Q. I take it the mist didn't prevent you from seeing—it didn't obscure them?

A. Well, I think possibly if you would look across there you could see headlights, yes.

Q. Is it your testimony that your windshield wiper was working on the outside at all times or was it just working some of the time?

(Testimony of John L. DeRosa.)

A. It was working at all times.

Q. So that the mist, steam, that you eliminated by the use of your hands, that was natural steam from the inside? A. Yes.

Q. The windows were rolled up? A. Yes.

Q. Was the radio playing or not?

A. I don't remember whether it was or wasn't.

Q. You don't remember one way or the other, is that right? A. No.

Q. Were you talking to your brother-in-law as you were approaching this crossing or not?

A. Well, we generally talked to each other all the way to work. [148]

Q. So that you were driving down Center Street, and as you approached the crossing and as you stopped, you were talking to your brother-in-law in the normal course?

A. In the normal course, yes.

Q. And your attention was directed to that, also?

A. Not entirely, no.

Q. In part? A. In part.

Mr. Phelps: I see it is after four, Your Honor. Does Your Honor——

The Court: You can't finish with this witness?

Mr. Phelps: No, I can't.

The Court: All right, we will now take a recess until tomorrow morning at ten o'clock, so all of you be here.

And I want to say, ladies and gentlemen of the jury, that this case will not go on on Friday. We will recess tomorrow at twelve and convene at one-

(Testimony of John L. DeRosa.)

thirty and recess again at three-thirty until next Tuesday.

Bear in mind, between now and tomorrow morning, the admonition I have heretofore given you.

(Thereupon, an adjournment was taken until 10:00 o'clock a.m., on Thursday, December 22, 1949.) [149]

December 22, 1949, 10:00

JOHN L. DeROSA

resumed the stand on behalf of the plaintiff.

The Clerk: Shanahan v. the Southern Pacific, for further trial.

Cross-Examination
(Continued)

By Mr. Phelps:

Q. Mr. DeRosa, referring back now to the time that you were on the Howard Street crossing, you were approaching the crossing and as you drove up to it and right down to the time of the impact, at any time did the visibility improve on the crossing?

A. Well, I couldn't say that it did.

Q. In other words, may I ask, did objects in and about the crossing at any time up until the impact become more apparent, more visible to you?

A. I couldn't say that they did.

Q. Did you see the beam of a headlight on the tracks?

(Testimony of John L. DeRosa.)

A. As you speak that, you speak of the shining on the tracks?

Q. Let me reframe my question so there will be no misunderstanding. As I understood your testimony, Mr. DeRosa, you saw a light itself on the locomotive at the point you have marked D-8?

A. Yes.

Q. And by that you meant the light as it sits on the locomotive? [150]

A. Yes.

Q. Light or lights. Now, then, of course, directed ahead of that light is a beam?

A. Yes, sir.

Q. Which projects itself out ahead and shines on down the track in the direction which the locomotive is headed?

A. Yes.

Q. Did you see that beam at any time prior to seeing the light itself?

A. Well, I believe I did see the beam of the light as I saw the light itself.

Q. All right. And that beam of that light, where did you see it?

A. Just in the—well, kind of hard for me to say. I believe, all I remember of seeing, the beam of the light was just a short distance from the light itself.

Q. And by a short distance, what do you mean?

A. Well, maybe—well, it would be hard to judge distance in feet—oh, I would say possibly or 50 feet.

Q. Just 40 or 50 feet ahead of the locomotive and on the track ahead of it, is that right?

A. I don't remember of it shining on the track; no, just the beam of the light in the air.

Q. In the air?

(Testimony of John L. DeRosa.)

A. Is all I remember of seeing. [151]

Q. About how far off the ground or tracks?

A. Well,—

Q. At that point of 40 or 50 feet?

Mr. Murman: From the headlight?

Mr. Phelps: From the headlight.

A. Oh, it seemed to me it would be probably three or four feet clear of the tracks.

Q. And did you see that beam as you described it, three or four feet above the tracks, 40 or 50 feet ahead of the locomotive, did you see that before or after you saw the locomotive headlight itself?

A. I saw it at approximately the same time.

Q. Do you have any recollection, Mr. DeRosa, of seeing the objects in and about the crossing being lighted up by the headlights before that which you have just described?

A. No, have no recollection of it.

Q. Then was it so dark that it was necessary for your own headlights to be used to show up objects ahead of you?

A. Yes, sir.

Q. It was that dark. All right. Now, having in mind that you say that it was that dark, and directing your attention once again, I ask you at any time when you were looking at this crossing before the accident, did you ever see the scene of the accident lit up by the headlight of the locomotive before the time you just described at only 40 or 50 feet ahead of the [152] locomotive which was then 200 feet away?

(Testimony of John L. DeRosa.)

Mr. Murman: Objected to as having been asked and answered.

The Court: This is cross-examination. You may ask a question more than once. Proceed and answer the question, if you understand it.

Q. (By Mr. Phelps): Do you understand my question? A. Not clearly.

Q. Then I will reframe it. Directing your attention, Mr. DeRosa, to the fact that you have said that your headlights were necessary on your own automobile to show up objects ahead, it was that dark, you say? A. Yes, sir.

Q. Now, directing your attention to that, and now asking you if at any time as you saw that crossing before the accident, you saw the objects in and around the crossing illuminated or lit up by the headlights of the locomotive?

A. As you're referring, is that prior to the collision?

Q. Yes. A. I did not.

Q. You did not. You did not see then the car itself lit up by the locomotive, is that right?

A. I saw——

Q. The headlight.

A. I saw the reflection of the headlight although very little on the car, as I remember. After I turned my attention from [153] the locomotive's light to the car.

Q. Now, I don't understand your answer.

Mr. Murman: I submit that is a clear answer, if the Court please.

(Testimony of John L. DeRosa.)

Mr. Phelps: It may be clear to you.

Mr. Murman: If counsel doesn't understand it, that is his fault, not the witness's.

Mr. Phelps: I was about to apologize to the witness that it was my fault, Your Honor.

The Court: Have the answer read again.

(Answer read.)

Q. (By Mr. Phelps): If I understand, then, you didn't see the reflection of the headlights on the car before you saw the lights of the locomotive, and then after that you just saw it very little, is that right? A. Yes.

Q. And before you saw this, did you ever see such objects as the telephone phones and the battery box and so forth, those objects around the crossing, lit up by the headlights?

Mr. Murman: That is before he saw the headlight?

Mr. Phelps: Yes.

A. No, I never.

Q. And at any time did you see those objects lit up by the headlights?

A. I can't remember of saying that I did. [154]

Q. Now, then, you have testified two trains, one on the passing track, one on the main line, which was the train involved in the accident; did you see any other trains around there at the time of the accident? A. No, I never.

Q. Did you see any other cars or equipment around there?

(Testimony of John L. DeRosa.)

Mr. Murman: Railroad cars?

Mr. Phelps: Railroad cars around there.

A. No, I don't remember seeing any other cars or equipment.

Q. So that there is nothing to obstruct the view of a person on the Howard Street crossing other than the depot itself?

A. I don't remember seeing anything else.

Q. I see. Now, then, may I ask you, Mr. DeRosa, if on this question of a wigwag it isn't true that—the fact is that although you did not see the wigwag in operation, the fact is that you don't know whether the wigwag was operating or whether it wasn't operating.

Mr. Murman: Your Honor, I object to that as calling for the conclusion of a witness on a purely hypothetical state of facts. All he can testify to is, Your Honor, is what he saw, can't assume that the wigwag was working if he didn't see it working.

The Court: No need for argument. I will allow the question. He is just asking if he saw it working, that is all.

Mr. Murman: If that is the question, I have no objection [155] to it.

A. I did not see the wigwag working.

Q. And you did not know whether it was working or not?

Mr. Murman: That is the same thing. Your Honor, he can only testify to what he saw, can't testify whether it was working or not.

The Court: I will allow the question. Do you know whether or not it was working?

(Testimony of John L. DeRosa.)

A. As my memory serves me, I can't remember of seeing it working, no.

Q. So that answer would mean, of course, you don't know whether it was working or not, isn't that fair to say?

A. Precisely.

Q. Yes.

Mr. Phelps: I have no other questions, Your Honor.

Mr. Murman: No further questions.

Mr. Phelps: As to the witness Mr. Hughes, if Your Honor please, I find I will not need to address any more questions to him, and he may be excused and so may this witness.

Mr. Murman: Then both Mr. DeRosa and Mr. Hughes may be excused, is that right?

Mr. Phelps: Yes.

Mr. Murman: Will you call Mr. Casebeer, please? While we are waiting, if the Court please, I have here a [156] document which I have shown to counsel which constitutes a communication from the Collector of Internal Revenue to Mr. Shanahan prior to his death which shows the amount of his earnings to the date of death, and I understand from counsel he has no objection to the document being introduced in evidence for that purpose.

Mr. Phelps: No, and I will stipulate that those figures are correct, whatever that figure is. You may enter into that stipulation, if you want.

Mr. Murman: I think we will just put this in evidence and in case there is any need to refer to it, we will have it marked.

(Testimony of John L. DeRosa.)

The Court: Stipulate that the document produced from the Internal Revenue will go into evidence.

Mr. Phelps: Yes, sir, Your Honor, but my understanding is, Mr. Murman, that that is the gross earnings before deduction of income tax.

Mr. Murman: That is the gross pay that Mr. Shanahan received as of the date of death, per annum.

Mr. Phelps: Rate of gross pay per annum.

Mr. Murman: That's correct.

DEWEY CASEBEER

called as a witness on behalf of the plaintiff; sworn.

The Clerk: Will you state your name to the Court [157] and jury, please?

A. Dewey Casebeer.

The Clerk: Statement of earnings is marked Plaintiff's 8 in evidence.

(Thereupon the statement of earnings was received in evidence and marked Plaintiff's Exhibit No. 8.)

Direct Examination

By Mr. Murman:

Q. Mr. Casebeer, you appear here pursuant to a subpoena issued by the plaintiff, are you?

A. I am.

Q. Where do you reside?

A. Anderson, Shasta County, California.

(Testimony of Dewey Casebeer.)

Q. And what is your business?

A. I am deputy sheriff, Shasta County, constable Township No. 5, Anderson, California.

Q. How long have you been acting in that capacity?

A. It will be 15 years on the 5th day of January in 1950.

Q. 1950? A. 1950.

Q. Now, did you know Mr. Shanahan before his death? A. I did.

Q. How long had you known him?

A. I met Mr. Shanahan before World War I.

Q. And where did you meet him?

A. Anderson. [158]

Q. Was he living in and about Anderson at that time? A. He was.

Q. Do you know what he was doing at that time?

A. Well, his folks had a ranch, prune trees, raised fruit.

Q. In other words, he was born and raised in that vicinity, is that correct?

A. I wouldn't say he was born there, I don't know just where he was born.

Q. Did you know that at the time of his death he was employed by the Bureau of Internal Revenue? A. I did.

Q. Prior to that employment, had he worked in the vicinity of Anderson? A. Yes.

Q. Do you know the nature of his work prior to that?

A. Well, before he worked for the Federal Gov-

(Testimony of Dewey Casebeer.)

ernment he was—he worked at the Irrigation Office there at Anderson, and also clerk in the Sheriff's office in Redding, Shasta County.

Q. Do you know whether or not he was ever justice of the peace up there? A. Yes.

Q. He was, is that right

A. Yes, he was.

Q. Now, a part of your work is that of enforcing traffic laws, is that correct? [159]

A. In the town of Anderson, just on the streets.

Q. You said you knew Mr. Shanahan before the first World War. What year was it before the first World War? A. Well, around 1916.

Q. Now, do you know whether or not from the time that you knew him in 1916 up to the time of his death, he drove an automobile during those years? A. Yes, he had.

Q. All during those years? A. Yes.

Q. And had you observed him driving on occasions?

A. I have a good deal since I have worked for Shasta County.

Q. Have you actually ridden with him as a passenger? A. No.

Q. But you have seen him driving?

A. Yes.

Q. And where have you seen him driving?

A. Well, I have met him many times on the highway and I saw him just ever so many times driving the streets of Anderson.

(Testimony of Dewey Casebeer.)

Q. Prior to his death, did you ever see him cross the track at Howard Street crossing?

Mr. Phelps: Objected to as incompetent, irrelevant and immaterial.

The Court: It is preliminary, I think.

Mr. Murman: That is correct. [160]

A. Yes, I have.

Q. About how many times, would you say?

A. Oh, be hard to say. I have met him, in fact I have met him on the other crossings also. I have met him at the Howard Street and Ferry Street crossing and when he was working in Redding, he would cross at the North Street crossing in Anderson.

Q. You have actually seen him go over all of those different crossings? A. Yes, I have.

Q. Calling your attention to the Howard Street crossing in the period of time that he was employed by the Bureau of Internal Revenue, about how often on the average, oh, say, a week as an interval, would you see him go across there?

A. Oh, I would say a couple of times a week; maybe more.

Q. Maybe more. At least a couple of times?

A. Yes.

Q. And when did you last see him go over that crossing that you can recall; approximately? Maybe I should ask this question first: Do you know when he was killed? A. Yes, sir.

Q. When was it? A. December 27.

Q. What year? A. 1948. [161]

(Testimony of Dewey Casebeer.)

Q. That would be about a year ago?

A. About a year ago.

Q. Now, prior to his death, when did you last see him go over the Howard Street crossing?

A. Well, I wouldn't know.

Q. I don't mean as to a particular day, but as to an interval of time, a week, a month, a few days, or what? A. I would say within a week, yes.

Q. Within a week.

A. Within a week.

Q. And prior to that time you said you had seen him go over there about twice a week on the average? A. Yes.

Q. No less than that? A. No.

Q. Now, in going over that crossing as you saw him, did he go from east to west or from west to east?

A. Well, I saw him go from the west to the east in the evening; I saw him in the morning go from the east to the west.

Q. Did you have an office or some place of business right near that crossing? A. No.

Q. Did you have a station that you occupied at times near the crossing?

A. I had a Standard credit card and the only Standard station [162] in town was right opposite that crossing and I bought most of my gas there for many years.

Q. And it was on those occasions you saw him, is that correct? A. Yes.

Q. Now, will you tell us what his course of con-

(Testimony of Dewey Casebeer.)

duct was on these various occasions as he went over those crossings?

Mr. Phelps: That is objected to as incompetent, irrelevant and immaterial, without foundation, not bearing on any of the issues of this case, and invading the province of the jury as to his conduct on other occasions; without foundation; no showing the circumstances were the same, no train bearing down on him, and so forth; incompetent, irrelevant and immaterial.

Mr. Murman: If the Court please, I think it is competent on the defense which has been made, namely, that Mr. Shanahan was negligent in crossing that crossing; that is an allegation in the answer of the defendant, and it is true as to that allegation that this testimony is directed. The issue is whether or not he used ordinary care and it is to that issue that this testimony is directed and I think it is quite competent to show a course of conduct which existed over a period of years prior to the accident and to the death of the individual who has been killed, partly where the issue is, where it is in this case.

The Court: Well, I am inclined to feel it isn't competent.

Mr. Murman: I will bow to the Court's ruling.

The Court: If you can show me some authority to the contrary, [163] I will, during the recess or during the noon recess, I will then change my mind, but I feel now that what a man may have done on one occasion is not competent to show what he

(Testimony of Dewey Casebeer.)

did on another occasion. In other words, it hasn't a bearing one way or the other.

Mr. Murman: I would agree with Your Honor except for the fact I understood the testimony over a period of many years he observed Mr. Shanahan go over this crossing at least twice a week, and it is not one instance, but it is a series of instances, which constitutes the course of conduct. It is my understanding that where that comes prior to the accident, things that happened subsequent to the accident are not admissible, but things happening prior to the accident in connection with a person's conduct or the operation of vehicles or various instrumentalities can be shown as some evidence of whether or not there was negligence at the time of the accident.

It is not—it is merely a circumstance, I concede, but it does bear on the issues and its does for admissibility, for what weight the jury wishes to attribute to it. In other words, the question is here of weight, not the admissibility, as I understand the rule.

Mr. Phelps: If your Honor please, it only takes one mistake to make a tragedy. It doesn't make any difference what a person has done in the past. The question here is what happened on this occasion and the conduct on that occasion. [164] Certainly no showing, in any event, that the circumstances were substantially similar.

The Court: I will sustain the objection at the present time and if you can produce for me any authority to support your position, Mr. Murman,

(Testimony of Dewey Casebeer.)

I will then allow the evidence in, if you find out today.

Q. (By Mr. Murman): Now, Mr. Casebeer, at the time that Mr. Shanahan was killed, I understood that you had seen him about a week before, that on the last occasion, is that what your testimony was?

A. Yes.

Q. Would you say at that time he was in apparent good health? A. Yes.

Q. And you have any state of mind as to his age?

Mr. Phelps: Can't we establish that exactly by the death certificate, or is there a difficulty there?

Mr. Murman: No, I don't think there is any difficulty, but as to the man's appearance.

Mr. Phelps: I am sorry; go ahead. I thought that I could stipulate and help you, but go ahead.

Q. (By Mr. Murman): About what would his age appear to you to be?

A. A man in his early 50's.

Q. Do you know anything about his personal habits? A. Just other than fishing is all.

Q. A good fisherman?

A. On weekends. [165]

Q. Do you know whether he had temperate habits or not? A. No, he did not.

Q. You say he did not have temperate habits?

A. I don't quite get you on the question.

Q. In other words, was he a sober man?

A. Oh, yes.

Q. Except when fishing, maybe?

A. No, no, when fishing, too.

(Testimony of Dewey Casebeer.)

Mr. Murman: You of course knew Mrs. Shanahan, his widow? Did you know her prior to his death? A. Yes.

Q. Do you know how long they were married prior to his death?

A. Oh, I would say six or seven years.

Q. At least that amount? A. Yes.

Q. Now, prior to the collision did you observe the time normally when the Beaver train No. 13 would come through Anderson?

Mr. Phelps: I object to that, incompetent, irrelevant and immaterial what time it came through.

The Court: Is that the name of the train involved in this case?

Mr. Murman: Yes, it is called the Beaver, train No. 13.

The Court: I will allow it.

A. Oh, between 7:20 and 8:00 o'clock. [166]

Q. (By Mr. Murman): In the morning?

A. Yes.

Q. In other words, it varied between those times, is that correct? A. Yes, it has.

Q. Was it more often through Anderson around 7:20 than 8:00 o'clock?

Mr. Phelps: Objected to as asked and answered, and leading and suggestive.

A. Well,—

The Court: I will allow it.

A. —I would say it come from 7:30, later.

Q. 7:30 later? A. Yes, 7:30 and later.

Q. By that you mean it more often came through Anderson around 7:30?

(Testimony of Dewey Casebeer.)

A. To my knowledge, yes.

Mr. Phelps: I object to that as leading and suggestive. It wasn't what he said before, and I ask the answer go out.

Mr. Murman: I was doing what you did a little while ago, trying to clear up my own understanding, and I will do the same as you did, apologize for not getting a clear answer.

Mr. Phelps: All right. I move to strike the answer, your Honor.

The Court: Oh, I don't know. I don't think it makes [167] any difference.

Q. (By Mr. Murman): You recall the morning of December 27, 1948, do you? A. I do.

Q. Where were you prior to 8:00 o'clock on that morning? A. Home.

Q. Where was your home?

A. Four blocks on South Street. It was west on South Street.

Q. What place? A. Anderson.

Q. South Street is further south than the three streets we have here on the map, isn't that correct?

A. Yes, it is.

Q. Is it the next street south of Howard Street?

A. Yes.

Q. What, if anything, occurred that morning around about 8:00 o'clock?

A. One of the members of the Southern Pacific, the agent, called me and said a train had hit an automobile and I said, "I will be right down," and hung up and went to get my coat, and the phone rang again and I picked up the phone and it was

(Testimony of Dewey Casebeer.)

Mr. Jeff, Jeff's Machine Shop, called me and said, "Dewey, Ellis Shanahan just got killed. Come right down."

Q. Do you go to the crossing?

A. I went right down. [168]

Q. When you got there did you see Mr. Shanahan's body? A. I did.

Q. Now where was it, as you recall?

A. Well, it was down below the crossing on the west side of the track, around, I would say, 15, 16 feet from the rail.

Q. When you say below the crossing, you mean below which crossing?

A. It would be south of Howard Street crossing.

Q. South of the Howard Street crossing?

A. Yes.

Q. Did you make any attempt to examine the body to ascertain whether Mr. Shanahan was alive or not? A. I did.

Q. What did you do?

A. My own knowledge, I saw that he was dead and I went back to my car and got a blanket to cover him up.

Q. You didn't see him breathing, is that right?

A. No.

Q. Did you see that automobile that was involved in the collision? A. Yes.

Q. Where was that?

A. Well, it was just a little past his body and a little more south. It was further south off of the main line of the side track that was there. [169]

Q. I show you plaintiff's exhibit No. 7, in evi-

(Testimony of Dewey Casebeer.)

dence, and ask you to tell me whether or not that is a picture of the wrecked car as you saw it?

A. Yes, that is it.

Q. Where was the train, or did you see the train at that time? A. I saw the back end of it.

Q. Was it beyond where the car had come to rest? A. Yes.

Q. About how much beyond, have you any idea?

A. Well, judging from the distance looking at the back end of it, I never went down there, I would say a quarter of a mile.

Q. The back end of the train was about a quarter of a mile beyond where the car had come to rest?

A. Yes.

Q. Did you take any notice of the number of cars on the train? A. No, I did not.

Q. Have you any idea at all as to the approximate number? A. Of cars?

Q. Yes. A. No.

Q. There was more than one car on the train, was there not?

A. Well, I could just see the back end.

Q. I see.

A. I was standing right in the track.

Q. When did you get there, approximately? [170]

A. Oh, right around 8:00 o'clock, as near as I could call the time, offhand. I never checked any clock or anything when I was called.

Q. How was the weather that morning?

A. Misty.

Q. Misty? A. Yes.

(Testimony of Dewey Casebeer.)

Q. When you say misty, do you mean that you could see mist in the air?

A. Yes. We call it "wet fog" up there in our country.

Q. Would you call it tule fog?

A. I don't know what tule fog is.

Q. It was too far north for tule fog? How about the daylight? What stage of light was there from morning dawn, could you tell?

A. Well, other than the mist at that time, why, it was clear enough. I didn't have to have lights on the car.

Q. You didn't have to have the lights on your car? A. No.

Q. That is, as you left your home about 8:00 o'clock and drove down there, you didn't use lights, is that right?

A. And as you looked down the track from where the automobile was to the end of the train, could you see the end of the train clearly or just see the lights on the end of the train?

A. I could see red lights. I believe they had a flare up [171] down there.

Q. What they call a fusee? A. Yes.

Q. Did you see any train crew?

A. Yes, I did.

Q. Did you talk to any of them?

A. No, never.

Q. When you got the crossing of Howard Street, the Howard Street crossing, did you see any flagman at the crossing?

Mr. Phelps: Just to be consistent, may it please

(Testimony of Dewey Casebeer.)

the court, I will make the objection. I know your Honor's ruling. This one added, it has no bearing after the train had crossed.

The Court: Overruled; he may answer.

A. No, I didn't.

Q. By the way, are you familiar with the length of time that this depot has been at the place where it was located on the morning of the collision?

A. It has been there a long time.

Q. Long time? A. Yes.

Q. In other words, it isn't a new building?

A. No, it isn't.

Q. Were you familiar with the wig-wag signal on the west side of Howard Street crossing?

A. Yes. [172]

Q. How long had that been there?

Mr. Phelps: I object to that.

A. A number of years.

Mr. Phelps: As long as it was there at the time, its origin I don't think makes any difference.

Mr. Murman: There is some obligation on the part of the railroad, where they put up a signal, that people can rely on it, Mr. Phelps.

Mr. Phelps: I realize that.

The Court: At any rate, it is answered. He said it had been there a number of years.

Mr. Murman: Oh, I didn't hear the answer, I am sorry. I thought the objection was being considered.

Q. Now, Mr. Casebeer, we placed in evidence here some photographs, plaintiff's exhibits 3, 4, 5

(Testimony of Dewey Casebeer.)

and 6. Were you present when those photographs were taken? A. I was.

Q. Do you know about when those photographs were taken?

A. Either the 30th or 31st day of December.

Q. Of the same year as the accident?

A. Yes, '48.

Q. Was that also true of the photograph of the wrecked car, plaintiff's exhibit 7? A. It was.

Q. Taken on the same day? [173]

A. Yes.

Mr. Murman: You may cross-examine.

Cross-Examination

By Mr. Phelps:

Q. Mr. Casebeer, you are the constable, are you?

A. Yes, sir.

Q. That is a county——

A. Constable of Township 5 in Anderson and deputy sheriff of Shasta County.

Q. So that Anderson is not an incorporated city?

A. No, it is not.

Q. It is one of the unincorporated towns——

A. Yes.

Q. ——on the side of the road. Do you know what the population of it is?

Mr. Murman: That is as of the date of the accident, Mr. Phelps?

Mr. Phelps: As of the date of the accident.

Q. If you can, approximately.

(Testimony of Dewey Casebeer.)

A. No, I don't have any account of the population there due to the three mills that went in there, and we had built up so that I have no idea.

Q. You say you were present when these pictures were taken that were introduced in evidence, that you have just identified? A. Yes, I was. [174]

Q. Who actually took them, you or somebody else?

A. Charley Brown, the photographer for the insurance office.

Q. So he would be the one who would know exactly where they were taken and at what point and what they show, I take it?

A. He would be one of them, yes.

Q. I take it he made measurements?

A. What?

Q. I take it he made measurements to record where he had taken them from, if you know?

A. It is possible he did.

Q. But you didn't? A. No.

Mr. Phelps: I have no further questions.

Mr. Murman: That is all, Mr. Casebeer. Thank you very much.

The Court: Could you conveniently wait here until this afternoon? A. Yes.

The Court: I have in mind the question that you asked, Mr. Murman.

Mr. Murman: Yes, your Honor.

The Court: The fact that I sustained the objection. I am having the law run down on it now and

(Testimony of Dewey Casebeer.)

I would like to have the constable stay on if he would.

Mr. Murman: I will endeavor to, during the recess, your [175] Honor, see if I could contact the office and have those authorities gotten together for you.

The Court: Would you kindly wait around?

A. I can't get out until 7:00 o'clock this evening, anyhow.

The Court: All right.

(Witness excused.)

Mr. Murman: Before I call Mrs. Shanahan, your Honor, I would like to read to the jury that part of this document, which is plaintiff's exhibit 8, which bears on the matter that I introduced it in evidence for.

Ladies and gentlemen, this document is dated November 9, 1948. It is on the letterhead of the Treasury Department, Internal Revenue Service, addressed to Mr. Ellis E. Shanahan, Internal Revenue Service, Red Bluff, California.

"My dear Mr. Shanahan:

"It gives me great pleasure to advise you that your promotion to grade CAF-8, \$4103.40 per annum, was effective October 3, 1948. Standard form 50 attached.

"Yours very truly,

"JAMES M. SMYTH,

"Collector."

Then form 50 is attached, and on that form 50 it shows Mr. Shanahan's name, his date of birth, December 1, 1893; and the effective date of the promotion, October 3, 1948; the fact that he has civil service standing in the twelfth [176] Civil Service Region at San Francisco; that his position is that of zone deputy collector; that his service grade and salary is CAF-8 (716-047), and at \$4103.40 p.a., which I understand is per annum; and that shows the approval by the Collector of Internal Revenue from Washington, and again Mr. Smyth's signature appears as the signature of the authenticator, Collector of Internal Revenue.

Mrs. Shanahan, will you take the stand, please?

NELDA SHANAHAN

plaintiff herein, called on her own behalf, sworn.

The Clerk: Will you state your name to the court and jury, please?

A. Nelda Shanahan.

Direct Examination

By Mr. Murman:

Q. Mrs. Shanahan, you are the plaintiff in this action, are you? A. I am.

Q. And where do you now reside?

A. Anderson, California.

Q. Also, was that your home a year ago?

A. Yes.

Q. How long had you lived in Anderson?

(Testimony of Nelda Shanahan.)

A. Since about 1923.

Q. Are you the widow of Ellis E. Shanahan?

A. I am.

Q. When were you married to Mr. Shanahan?

A. On June 16, 1938.

Q. A little more than ten years prior to his death, is that right? A. Yes.

Q. Did you and he live together after your marriage up until the time of his death?

A. We did.

Q. As man and wife? A. Yes, sir.

Q. Now, what was Mr. Shanahan's age at the time of his death?

A. He was 55 on the 1st day of December.

Q. Was he in apparent good health?

A. He was.

Q. Was he supporting you at the time of his death? A. Yes.

Q. Had he been supporting you right along?

A. Yes, sir.

Q. You were dependent upon him, were you, for your support? A. I was.

Q. What was your age at the time of his death?

A. 43.

Q. So far as you know you were in good health then and are now, is that correct? [178]

A. Yes.

Q. Since his death have you remarried?

A. No, sir.

Q. You are his widow, are you, at this time?

A. Yes, sir.

(Testimony of Nelda Shanahan.)

Q. Did you have any children by Mr. Shanahan?

A. No, sir.

Q. You are his sole heir, is that correct?

A. Yes, sir.

Q. You knew of Mr. Shanahan's employment, did you not? A. I did.

Q. You just heard me read plaintiff's exhibit 8 to the jury. Is that a correct statement of his employment, and earnings, so far as you know?

A. So far as I know.

Q. And those earnings that he received as set forth in this statement, those were gross earnings, is that correct? A. Yes.

Q. Taxes were taken from that amount of earnings, is that correct?

A. Taxes and for the pension fund.

Q. Have you subsequently received the pension fund?

A. I received a portion of what he had paid in, but I have received no pension.

Q. You have received no pension, but you did receive a part [179] that was deducted from his salary, that he paid in? A. That is right.

Q. So that amount that I read, \$4103.40, was only diminished by taxes, is that correct?

A. That is right.

Q. Now, do you have any personal knowledge of the accident at all?

A. I have none whatsoever.

Q. Where were you when the accident occurred?

A. I was at home. It was right after the holi-

(Testimony of Nelda Shanahan.)

days and I had remained in bed that morning and knew nothing about it until my folks came to tell me.

Q. When did you last see Mr. Shanahan before he was killed?

A. Well, I couldn't tell you the exact hour. I remember when he came to leave for work to tell me goodbye, but I didn't look at the clock.

Q. You mean on the morning that he was killed?

A. Yes, sir.

Q. He came to you and kissed you goodbye, did he?

A. That is right.

Q. Did you know his destination at the time?

A. Yes, sir.

Q. And was it Redding?

A. He was going to Redding before he went to his office in Red Bluff. [180]

Q. He had a superior officer in Redding?

A. He did.

Q. Mr. Smith? A. C. Fred Smith, yes.

Q. Did you ever see him again after he kissed you goodbye that morning?

A. No, sir.

Q. Now, did you take charge of his funeral?

A. I did.

Q. Was there expense incurred in connection with the funeral?

A. Well, the funeral bill that I paid.

Mr. Phelps: Can you tell me what it is, counsel, and I will stipulate to it.

Mr. Murman: Yes. I have here the bill which shows the total amount paid was \$317.44.

Mr. Phelps: So stipulated.

(Testimony of Nelda Shanahan.)

Mr. Murman: That was a reasonable value of those services, was it?

Mr. Phelps: I will stipulate to that, too.

Mr. Murman: Then it won't be necessary to put this in evidence, your Honor.

Q. Were there any other expenses that you paid in connection with Mr. Shanahan's death?

A. Yes, there was a towing bill that I paid to remove the car from the wreck to the garage of \$6.50. [181]

Q. You paid that?

A. My brother-in-law paid it and then I paid him.

Q. Eventually you paid it?

A. Yes, I paid it.

Q. You believe that is a reasonable amount for the work done?

Mr. Phelps: We will stipulate to that. We make no point of that. Are there any other services, any expenses?

Mr. Murman: I don't think of any.

A. I do think of one. I paid Dr. Thomas \$10.00 to be with the body when they examined it afterwards. I asked that Dr. Thomas be there and the coroner kindly consented.

Mr. Murman: You mean at the autopsy?

A. Well, when they took him to Redding.

Mr. Phelps: We will enter into a stipulation as to that charge, too, Mr. Murman.

Mr. Murman: Thank you. I have no further questions at this time of Mrs. Shanahan.

(Testimony of Nelda Shanahan.)

Cross-Examination

By Mr. Phelps:

Q. Mrs. Shanahan, just one or two questions. Do you know what Mr. Shanahan's take-home pay was, that is, what his check was after deductions of withholding taxes?

A. I wouldn't just be certain, but around \$100.00 and—I don't know whether it was \$132.00 or \$135.00. That would have been every two weeks.

Q. I see. [132]

A. They paid on an every two weeks' basis.

Q. I think I missed it and I would like to ask you, how long were you married to Mr. Shanahan?

A. Since June 15, 1938.

Q. Before that, Mrs. Shanahan, had you had any experience working?

A. I have worked all my life up and until after he and I were married and then I worked until 1944, and then I didn't work from 1944 until after Mr. Shanahan was killed.

Q. What I mean by working, I mean employed some place.

A. Yes, sir.

Q. What was the general nature of your work, clerical work?

A. Yes, office work. Secretary.

Q. Secretary? So you do do that type of work?

A. Yes.

Q. Are you now employed? A. Yes, sir.

Q. You are employed as a secretary?

A. Yes, sir.

(Testimony of Nelda Shanahan.)

Q. At Anderson——

A. Cottonwood Irrigation District.

Mr. Phelps: Thank you very much, Mrs. Shanahan.

Redirect Examination

By Mr. Murman:

Q. Mrs. Shanahan, the sum of \$132.00 or \$135.00 bi-weekly, are you sure of that? [183]

A. No, I am not, Mr. Murman.

Q. If you divide that figure up by 12 it is somewhere around \$320.00 a month.

A. It was 26 payments a year. I don't know just how.

Q. Could you be estimating that pay based on a previous pay status? A. It could have been.

Q. After all, this promotion he got was only about two months before he was killed.

A. That is right. It could have been more. I don't just recall.

Mr. Murman: I have no further questions.

Mr. Phelps: Have you any way of establishing the exact amount by income tax returns or otherwise?

A. I don't, but I am sure that is all in Mr. Smith's office.

Mr. Phelps: But you don't know? A. No.

Mr. Phelps: Thank you very much, Mrs. Shanahan.

Mr. Murman: I have no further questions.

Mr. Phelps: I have none.

(Witness excused.)

Mr. Murman: I have a few additional matters here, if the Court please. First, I have already shown this to counsel, I have an authenticated copy of the certified copy of the death certificate, and I ask at this time that that be admitted [184] into evidence as plaintiff's exhibit next in order.

Mr. Phelps: No objection.

(The death certificate was thereupon marked Plaintiff's Exhibit No. 9 in evidence.)

Mr. Murman: At this time I ask leave to read the death certificate to the jury.

Ladies and gentlemen of the jury, this death certificate reads as follows:

"Full name, Ellis Ellsworth Shanahan; district No. 4551, Registrar's No. 155. Place of death, Shasta County. City or town of Anderson. If outside city or town limits, write rural. Name of hospital or institution: Howard Street and Southern Pacific Railroad crossing. In this community, life; in California, life; in the United States of America, life. Veteran of World War I. Social security number, none. Sex, male. Color or race, white. Single, married, widowed, or divorced, married. Name of husband or wife, Nelda Shanahan. Age of husband or wife if alive, 43 years. Birth date of deceased, December 1, 1893. Age, 55 years and 26 days. Birth place, Anderson, California. Usual occupation, deputy collector of internal revenue, Treasury Department. Father's name, Ross Shanahan. Birthplace,

Colusa County, California. Mother's [185] name, Sarah Jane Winsell. Birthplace, Ball Ferry, Shasta County, California. Informant, Mrs. Nelda Shanahan. Address, P. O. Box 103, Anderson, California. Burial: Date, December 29, 1948. Place, Anderson Masonic Cemetery. Embalmer's signature, Rudy V. Balma, license No. 3533; funeral director, McDonald's Chapel, address, Redding, California, by Glen R. Linn. Date filed, December 29, 1948. Winona V. Simmons, registrar's signature.

Usual residence of deceased, California, Shasta County, town of Anderson, 1018 Ferry Street. Date of death, December 27, 1948, 7:45 a.m."

There is no medical certificate, but there is a coroner's certificate:

"I hereby certify that I held an investigation on the remains of the deceased and find from such action that deceased came to his death on the date and hour stated above. Immediate cause of death: Violent traumatic injury to skull (extensive lacerations left parietal-temporal and frontal cheek); immediate; due to possible skull fracture, crushing injury (multiple fractures) both right and left chest; multiple contusions and abrasions on face, upper and lower extremities. Julius M. Kehoe, M. D.

"If death was due to external causes, fill in [186] the following: Due to accident, December 27, 1948, at Anderson, Shasta, California. If injury occurred in or about home, on farm, in industrial place, or in public place?" That is filled in, "Public place." "Means of injury, hit by railroad train. Coroner's

signature, Claude E. Whiteman, coroner, Redding, California, December 27, 1948.”

Mr. Murman: Pursuant to a motion, your Honor, filed in connection with the rules regarding discovery, there was introduced and furnished to the plaintiff the following which I think under the rule is therefore admissible under evidence.

Mr. Phelps: I would like to see it, if I may.

Mr. Murman: These were produced by you.

Mr. Phelps: I haven't seen them. Anything else you want, Mr. Murman; as you know, I wasn't in the earlier stages of this case. I never saw this before, it may be that we could stipulate it may go, I think we probably can. But I would like to look at those a little bit—it is approaching the recess anyway—because otherwise I don't think this would be the proper way to prove it. Of course, it is only produced for inspection.

Mr. Murman: No, it was furnished to me as the records of the Southern Pacific.

Mr. Phelps: May I look at it?

The Court: Suppose we take a recess now, a ten-minute [187] recess now, gentlemen, and you can look at it during the recess.

We will take a recess now. I would like to have both of you come into my chambers after the jury leaves for just a second.

Ladies and gentlemen, we are taking the usual recess. During the recess will you bear in mind the admonition I have heretofore given you.

(Recess.)

Mr. Phelps: If your Honor please, so that we may understand each other, the records that counsel showed me were records which we furnished under a response to a notice to produce. I don't accede the contention that they are admissible in and of themselves, because of that they would require explanation of how they are kept, what they mean, and so forth. It would require a witness to explain these records; they are not self-explanatory.

However, I don't want to urge any objection. In fact, I am willing to state my understanding of what these show. Mr. Murman can correct me or ask me to add anything to it to amplify, if it is here, and I will endeavor to state the correct facts from these as though a witness were here to testify about it, if that is satisfactory. Here are the facts——

Mr. Murman: I think this being part of my case, I think [188] I should make the offer to the court and then if Mr. Phelps has any explanation we can, of course, produce such explanatory information that he wishes to establish the case as it goes along, but I have been furnished with these documents as the records of the defendant in connection with the operation of the train in question, and particularly as to the information on the white sheet of paper. I don't see how that needs any explanation, and I would be willing to submit to your Honor for examination.

Mr. Phelps: As to that, your Honor, I might say that was a compilation made from this record and other records. I think, Mr. Murman, I can do exactly what you are when I suggested this, but you

couldn't prove this without calling witnesses, and I am trying to stipulate to the facts. I will read this part first, is that all right or——

Mr. Murman: I don't see why I could read it.

Mr. Phelps: Well, it is tweedledee and tweedledum.

The Court: It doesn't make any difference who reads it.

Mr. Phelps: Except we don't want any errors to creep in.

The Court: Let me see it. I understand that these documents were produced in accordance with a notice to produce?

Mr. Murman: That is correct, your Honor.

Mr. Phelps: For an inspection.

The Court: Yes, for inspection.

Mr. Murman: These were the copies furnished to me rather [189] than my personally inspecting a series of records, which would have put the defendant to great inconvenience, as I understood it, and I took the word of Mr. Dunn as authenticating that information, as being the correct information, and was furnished with that document as the correct information.

Mr. Phelps: That is correct, your Honor, and I am offering to stipulate as a fact, but that is a compilation made from these and other records which he has forwarded to you, and others, and so far as that is concerned, there is no objection to that whole thing going exactly as it is with one very necessary added explanation which is,—well, which on the face of it shows that it requires.

The Court: Have you any objection to that explanation?

Mr. Murman: No, after I read he can make any explanation he wants to.

Mr. Phelps: Doesn't make any difference to me who physically reads it, if that is what he is quarreling about.

The Court: You may make your explanation afterward.

Mr. Phelps: May I say we are willing to stipulate to these facts, not asking him to produce witnesses to prove these facts.

Mr. Murman: I think under the rule it could be received any way.

Mr. Phelps: I think not. I want the jury to know this, that we are giving it to him and not just giving him something [190] he is entitled to otherwise——

The Court: Plaintiff's Exhibit 10 in evidence.

(Whereupon the document entitled "Run of Train No. 13" was received in evidence and marked Plaintiff's Exhibit 10.)

Mr. Murman: Thank you.

Ladies and gentlemen, I will read what I have here, and if Mr. Phelps has any further explanation to make, why, of course, I have no objection to him making that.

This piece of paper which I have is a carbon copy of an original and it has at the top the words "Run of Train No. 13, December 27, 1948—Klamath Falls, Oregon, to Gerber, California.

“Arrived Klamath Falls 2:00 a.m., left 2:25 a.m.”

I should state prior to that there appears on the righthand portion of the page just above the information I read about the arrival and leaving time, the words “15 cars,” which I understood when it was given to me to be the number of cars that consisted the train.

Then, the next after the arrival at Klamath Falls at 2:00 a.m. and leaving at 2:25 a.m., then it shows, “by Dorris, California at 2:52 a.m.”

and I understand that to mean it went by, that train, at that time, and did not stop.

Also, “by Mt. Hebron at 3:04 a.m., by Bray at 3:20 a.m., arrived Grass Lake 3:46 a.m., left 3:55 a.m. By Bolam [191] at 4:15 a.m., arrived Black Butte 4:36, left 4:45 a.m. Arrived Dunsmuir 5:34 a.m., left 5:45 a.m., arrived Redding 7:29 a.m., left 7:34 a.m., arrived Anderson”

and there is no arrival listed, but there is the leaving time as “left 8:30 a.m. By Cottonwood 8:36 a.m., arrived Red Bluff 8:55, left 8:58, arrived Gerber 9:10 a.m.”

That is the running time of the train on the day in question, as I understand it.

Mr. Phelps: That is correct; stipulate to that. May I add this, that of course the time is daylight saving time.

Mr. Murman: Here is a notation at the base, at the bottom of the page, which so states and——

Mr. Phelps: And the next times as you read, they are all Pacific times.

Mr. Murman: There is no question about that.

Mr. Phelps: All right.

Mr. Murman: Now, the time table schedule, ladies and gentlemen, is always, or generally, in Pacific Standard time. Railroads don't recognize daylight saving time normally, and deals with the standard time table schedule. For daylight saving time the clock is advanced an hour on each hour, that is, as soon as the train got into California.

This is the regular schedule. "Arrive at Klamath Falls 1:10 a.m., left 1:30 a.m., by Dorris at 1:48 a.m., by Mt. Hebron 2:03 a.m., by Bray at 2:20 a.m., arrive at [192] Grass Lake 2:40 a.m., by Bolam 2:55 a.m., arrive Black Butte 3:20 a.m."

Now, you notice an hour jump here, "arrive Duns-muir 4:15 a.m., leave 4:25 a.m."

That would, on daylight saving time, be normally 5:15 a.m. and 5:25 a.m.

"Arrive at Redding 6:10 a.m." For daylight saving time it would have been 7:10. "By Anderson, 6:21 a.m.," which would normally be 7:21 a.m. "By Cottonwood 6:28 a.m., arrive Red Bluff 6:50 a.m., and arrive Gerber, 7:05 a.m." Down at the base, the bottom of what I have read to you appears:

"California Daylight Savings went into effect March 14, 1948, and terminated January 1, 1949."

That, of course, explains the whole difference between all of these figures that I have read you apart from the actual difference which the daylight saving figure would show.

Is that a full explanation, now?

Mr. Phelps: With one exception, Mr. Murman.

Mr. Murman: All right.

Mr. Phelps: Did I understand you to say there was a change?

Mr. Murman: No, I just said about an hour jump, I imagine is running time between Black Butte and Dunsmuir, isn't that right, Mr. Phelps?

Mr. Phelps: No, this train left Klamath Falls, when it [193] left, it left on daylight savings time. All the times listed that you read as a time schedule are Pacific Standard time. No such hour jump.

Mr. Murman: Fine. I had in mind——

Mr. Phelps: Although it left Klamath Falls, Oregon, these times are recorded California Daylight Saving time because the crews run into California and for convenience they change their clock at Klamath Falls.

Mr. Murman: That is the division?

Mr. Phelps: Yes, that is the division.

Mr. Murman: I have one other matter, if the court please, before closing the plaintiff's case.

I have here, your Honor, the official publication of the United States Department of Commerce showing United States life tables and actuarial tables, ranging between range 1939 and 1941, and these tables show that as to a male at age 55 he would have an average future lifetime or life expectancy of 18.34 years. In other words, approximately 18 and 1/3 years.

As to females——

Mr. Phelps: I will object to any information——

The Court: You don't want the ladies on the jury to know that they will live longer than the man?

Mr. Phelps: I am sure they do, your Honor, but I don't see the materiality. It is to the death of this Mr. Shanahan and his expectancy—— [194]

Mr. Murman: I want to tell as to the life expectancy of Mrs. Shanahan, at least was an expectancy as long as her husband's.

Mr. Phelps: The question is, of course, to Mr. Shanahan's lifetime, because it is a question of Mrs. Shanahan's pecuniary loss and she could only expect to have a pecuniary loss during his normal life, and doesn't go beyond that.

Mr. Murman: I concede that—but if she should predecease him, the life expectancy, of course, couldn't——

The Court: You can stipulate according to those tables that she would live at least as long as he.

Mr. Murman: That is agreeable.

Mr. Phelps: Certainly.

Mr. Murman: That is the plaintiff's case, if the court please. The plaintiff rests. [195]

The Court: Before you proceed, Mr. Phelps, that case I mentioned yesterday was the case of Bickford v. Mauser, 53 Calif. Appell. 2d. I have forgotten the page number.

Mr. Phelps: I understand for the record counsel is withdrawing his position in that respect.

Mr. Murman: Well, depending upon the facts as they develop.

Mr. Phelps: Yes.

Mr. Murman: I understand there is some doubt about whether or not the statement was pre-existing statement due to what the witness couldn't recall,

so depending on what develops, we will cross that bridge when we come to it, Your Honor, if we may.

Mr. Phelps: Yes, then I have a matter to take up with the Court in the absence of the jury.

The Court: All right. Ladies and gentlemen, you are about to be allowed to go to the jury room for a little while, and when you do will you bear in mind the admonition I have heretofore given you. The bailiff will take you to the jury room while there are some arguments made to me. Well, perhaps we could let them go.

Mr. Phelps: I was thinking of that.

Mr. Murman: It is very close to 12:00 o'clock.

The Court: Instead, you will be allowed to go to luncheon now and return at 1:30. [196]

Mr. Murman: That is a half hour earlier than usual, Your Honor?

The Court: Yes, because, as I told you yesterday, I have to leave just a little bit before 3:30.

(Thereupon the jury was excused and the following proceedings were had outside the presence of the jury:)

Mr. Phelps: Now, then, may it please the Court, on behalf of the defendant Southern Pacific Company at this time I move for a judgment of dismissal pursuant to the appropriate Federal Rules of Civil Procedure and, in the alternative, for a directed verdict in favor of the defendant Southern Pacific Company, upon the ground that, first, that taking the evidence as you must at this point, there isn't any evidence sufficient to sustain a finding of any

liability on the part of the defendant Southern Pacific Company; that there is no evidence of any act or omission on the part of the defendant which proximately contributed to the cause of action, of any officer, agent, servant or employee of the defendant Southern Pacific Company; and on the ground that there is no showing of any negligence on the part of the defendant Southern Pacific Company; and on the further ground, if Your Honor please, that the evidence at this stage of the case can be only considered in one light, that the plaintiff—that is, the deceased himself—that the deceased, Mr. Shanahan, driving his car across the crossing as has been described by the witnesses, [197] must be held to be guilty of contributory negligence as a matter of law in driving in front of the approaching locomotive.

Now, then, if Your Honor please, in addition to the grounds specifically enumerated, I should like to point out certain points of evidence to you, and in doing so, ask that my grounds of motion include the matters I heretofore stated.

(Arguments of counsel for the defendant in support of the motion and arguments of counsel for the plaintiff in opposition thereto omitted.)

The Court: We will adjourn until 1:30.

(Thereupon this cause was adjourned to the hour of 1:30 p.m.) [198]

December 22, 1949, 1:30

(The following proceedings were had without the presence of the jury:)

Mr. Murman: If the Court please, Mr. Casebeer was asked to remain on the attendance of the Court. I assume we can release him at this time in view of our determination as to the problem of the past conduct, course of conduct that we were discussing earlier.

The Court: Yes.

Mr. Murman: So it will be agreeable that he be released at this time?

Mr. Phelps: Yes, Your Honor; I think for the record we might portray what happened in chambers. I should like to have the record show that I do enlarge upon the objection stated, and upon the additional ground that it is without foundation in that in this case there were eye witnesses to the actual happening of the accident. I understand Mr. Murman is not pressing his point.

The Court: Yes. The record can show that counsel and I discussed the matter of that objection which I sustained.

Mr. Murman: Yes, Your Honor.

The Court: In chambers. At that time I called attention of Mr. Murman to the rule that was just stated by Mr. Phelps that prior conduct is not really admissible in evidence unless [199] no eye witnesses to the accident, and for that reason I sustained the objection.

Another matter that I would like to direct to the

Court is the map which we have been using has never been given a number and although, as I have said, the plaintiff rests, at this time for the purpose of the record I would like to reopen the plaintiff's case to have this map put in evidence as Plaintiff's next in order for the markings and the various identifying figures that have been placed upon it.

The Court: So ordered. That is no objection?

Mr. Phelps: Only the objection, if Your Honor please, that the map hasn't been approved. I can not stipulate that the map is correctly drawn as of the time of the accident. I do have a map that is correct and will have the correct measurments.

The Court: Well, the trouble is that we have used this map right through during the trial of the case and the map anyway, is only admitted for the purpose of illustration.

Mr. Murman: That is correct, markings on it.

The Court: And I will allow it in for that purpose. Have it marked the next exhibit in order for illustration.

Mr. Murman: Plaintiff's 11.

Mr. Phelps: I have no objection to the reopening of the plaintiff's case for that purpose, but would like to state it is without foundation, it hasn't been established, hasn't been [200] determined, when the measurements for it were taken, and the scale and the details of it.

(Thereupon the map displayed on the blackboard and marked Plaintiff's Exhibit No. 11 was received in evidence.)

(At this stage of the proceedings argument was had upon the motion for a non-suit. At the conclusion of the argument the Court ruled as follows:)

The Court: I will deny the motion for non-suit and let us go ahead with the trial as far as we can get today and I will study these cases. I deny that motion without prejudice to the renewal thereof at the conclusion of your own evidence.

Mr. Phelps: Very well, Your Honor.

(Recess.)

(The following proceedings were had in the presence of the jury:)

Opening Statement of Mr. Phelps not made a part of this record at the request of counsel. [201]

WILLIAM R. ORR

called as a witness on behalf of the defendant; sworn.

Q. (By The Clerk): Will you state your name to the Court and jury, please?

A. William R. Orr.

Direct Examination

By Mr. Phelps:

Q. Mr. Orr, what is your full name, please?

A. William Richard Orr.

Q. Where do you live?

A. Dunsmuir, California.

Q. By whom are you employed?

(Testimony of William R. Orr.)

A. Southern Pacific Company.

Q. In what capacity?

A. Assistant engineer.

Q. How long have you been in that capacity?

A. About ten years.

Q. As such, is one of your duties to prepare maps and make measurements of the right of way?

A. That is right.

Q. Did you have an occasion at the request of your employer to make measurements and prepare a map in the town of Anderson showing the crossings at Howard Street, the Howard Street crossing, together with the North Street crossing?

A. Yes.

Q. Tell us whether those measurements—did you make measurements? [202]

A. Yes.

Q. By way of a steel tape?

A. Yes.

Q. And instruments?

A. And transit.

Q. Transit?

A. Yes.

Q. Have you then, after taking those measurements, prepared a map by the use of the measurements?

A. Yes.

Q. Will you step over to this map, and I will ask you if you can identify that as the map which you prepared, or which was prepared under your direction and supervision?

A. (Leaving witness stand): It is.

Mr. Phelps: I will ask that that be marked.

(Thereupon the map referred to was marked Defendant's Exhibit D for identification.)

(Testimony of William R. Orr.)

Q. (By Mr. Phelps): Now, then, Mr. Orr, stay here if you will. Does this map truly and correctly portray the scene of the accident, drawn to scale?

A. It does.

Mr. Phelps: I ask that that be introduced in evidence.

Mr. Murman: Well, just a moment. We haven't had any date when those measurements were made, Your Honor. [203]

Mr. Phelps: Very well, I will establish that, Your Honor.

Q. Now, when did you make those measurements? A. January 4, 1949.

Q. And in your department, the engineering department, is part of your job to know what changes and corrections and additions were made in the railroad? A. That is right.

Q. Including the division where Anderson is?

A. Anderson?

Q. Yes. A. Yes.

Q. To your knowledge, were any changes and corrections made from December 27, 1948, to January 4, 1949? A. On that map?

Q. No, any changes or corrections made in the railroad between that time, at Anderson.

A. Between what dates?

Q. December 27 to the date of the accident and the date of your measurements, January 4th.

A. No, there was no change.

Mr. Phelps: Now we offer it, if Your Honor please.

(Testimony of William R. Orr.)

Mr. Murman: His testimony, as I understand it, Your Honor, is limited to the railroad. If there are other matters on the map, it seems to me the map might be introduced for the [204] purpose of illustration, but if it is going to be contended that every line on the map is just as it was on the day of the accident, which was over a week prior thereto, I think we will have to have proof of all that.

Mr. Phelps: Then I renew my objections to Mr. Murman's map, if the Court please, and move to strike it.

Mr. Murman: That is only in for illustration.

The Court: I will allow this in for illustration also.

Mr. Phelps: I am offering it for the purpose of showing the conditions of the railroad at the time and the physical objects shown on that map.

The Court: I think I will admit it. I think there is sufficient foundation.

(Thereupon the map referred to was admitted into evidence as Defendant's Exhibit D.)

Q. (By Mr. Phelps): All right, now, then, I want to call your attention to the Howard Street here, and I notice a brown line running directly crossways to the railroad tracks there. What is that?

A. That brown line? That is the Howard Street crossing.

Q. That is the Howard Street crossing? Now I am pointing to an object. What is that?

A. That is a signal.

(Testimony of William R. Orr.)

Q. What kind of a signal?

A. Wigwag, they call it. In other words, to warn motorists. [205]

Q. Can you tell us whether or not the wigwag signal is in the position it was when you made your measurements?

A. It is.

Q. And now, then, I notice that we have two—I am pointing to, well, there is a cross sign there, looks like a stop sign. What is that?

A. That is an arterial stop sign.

Q. That I am now pointing to?

A. Yes. It reads "Stop."

Q. All right, let's mark Stop Sign. What is this little mark here?

A. We call that a cross-buck. That is a railroad term. CS-13.

Q. Now, then, Mr. Orr, I notice that to the right of that there is also stop sign and a cross-buck and two crossings. Will you tell us what that is?

A. That is an error and I found it out and didn't change the map, just crossed out.

Q. As you were preparing the map from your notes, am I correct, after having prepared it you then checked your notes against the map?

A. Yes, that is right.

Q. In all particulars, and found this error?

A. That is right.

Q. And that is the only error you found? [206]

A. Yes.

Q. So that the crossed out part is not the correct position, but where it is is the correct position?

(Testimony of William R. Orr.)

A. Yes.

Q. Can you tell us where the base of that arterial stop sign would be, in what portion of the——

A. Portion of the—the lower portion, of course, is the base. That is in the ground.

Q. Now then, the same thing applies to the wig-wag signal and the cross-buck sign?

A. Yes.

Q. Do you have the measurements or distance of the arterial stop sign to the center of the track?

A. Yes.

Q. Will you take the stand again?

(Witness resumed the stand.)

Q. Do you have that measurement? What is it?

A. The distance out from the center line of the main track of that to the stop sign, 33 and seven-tenths feet.

Q. Then what is the distance between the center line of the main track and the center line of the track to the east of that?

A. 18 and three-tenths feet.

Q. I beg your pardon?

A. 18 and three-tenths feet. [207]

Q. And between the track that I am now pointing to, and which continues on across the map without a switch. What is the distance between the main track and the passing track? A. 13 feet.

Q. That is the track to the west?

A. Thirteen feet.

Q. Yes. Can you tell us whether the 13 feet is the ordinary, usual, standard clearance in railroads?

A. That is the least they can go.

(Testimony of William R. Orr.)

Q. That is the standard clearance, is it?

A. Yes.

Q. How far is the—well, the station building is correctly plotted?

A. That is right.

Q. If we want to determine any distance we can scale it off?

A. Yes.

Q. What is the scale on the map?

A. One inch on the map equals 20 feet on the ground.

Q. Will you step up, please, and give us the distance, then, between the crossing and the most southerly portion of the station, or do you have it there?

A. It is 146.7 feet. That is the center line of the main line and right angle from the station.

Q. How long is the station building proper?

A. Station building proper is 125 feet on the building proper. [208]

Q. What is the distance between Howard Street crossing and the Ferry Street crossing.

A. 530 feet.

Q. And the distance between the Ferry Street and the North Street crossings?

A. I don't have that; it is 975 feet from the Howard Street crossing to the—

Q. To the North Street crossing?

A. Or a distance of 444 feet.

Q. On the North Street crossing there is some—on either side there are some indicators. What are those?

(Testimony of William R. Orr.)

A. Crossing bells to warn motorists and some cross-bucks.

Q. Flashing lights? A. Flashing lights.

Q. Now then, can you tell me whether you visited this scene which is portrayed by this map on December 27, 1948? A. I did.

Q. So that can you state, so that there will be no question about it, that the conditions, from your observation, were the same, the scene portrayed there on or about December 27, from personal observation, as they were when you made the observations for this map?

A. There was no change whatsoever.

Mr. Phelps: You may cross-examine.

Cross-Examination

By Mr. Murman:

Q. Did I understand that, Mr. Orr, your measurements that you made were confined within the railroad right of way, is that correct?

A. That is right.

Q. In other words, you didn't make measurements in this area contained on the map where Howard Street appears and where Ferry Street appears and where North Street appears as to property lines and store lines?

A. We have ties to those store lines with our railroad, actual ties.

Q. What?

A. In other words, our railroad is tied to the town of Anderson by engineer stations.

(Testimony of William R. Orr.)

Q. But you didn't make measurements yourself in order to ascertain what you have represented here at the base of the diagram as being the intersection of Howard Street and Center Street, Ferry Street and Center Street, and North Street and Center Street, is that correct?

A. That is correct.

Q. And that was true of the Highway 99 area which you show at the upper portion of the map?

A. I did make a tie of that U. S. 99. U. S. 99 right of way and ours is common.

Q. Do you mean to say the width of 99 is only the width which is shown here? [210]

A. That is the traveled way.

Q. Pardon?

A. That is the traveled way. That is the paved portion.

Q. Paved portion? A. At that time.

Q. Was that a two-lane highway at that time?

A. It was.

Q. Did you make measurements here of the fire-house? A. Yes.

Q. And the store? A. Yes, sir.

Q. You made those measurements yourself?

A. Yes.

Q. Those measurements were made in January of 1949? A. January, 1949.

Q. Now, there have been some other marks made on here that you haven't explained. Can you step down here and tell us what those are?

(Witness left the witness stand.)

(Testimony of William R. Orr.)

Q. I am pointing to a black dot, which apparently runs into the main line at a point where a switch occurs. Where is that?

A. That is a switch stand.

Q. What is this little circle which is above it to the left?

A. That is a signal pole light, a pole for a signal light. [211]

Q. You mean there is a pole, the base of which is there? A. That is right.

Q. You didn't show the elevation of the pole as you do of these other items, did you?

A. I just put a dot to indicate the location.

Q. The way you have this wig-wag signal placed, it looks like it is over on its side. That is the position of it? A. No, sir.

Q. Doesn't it go straight up in the air?

A. Vertical.

Q. Why did you put it on its side like that?

A. It is a flat map.

Q. Well, you have this cross-buck and stop sign vertical down below on the other side of the crossing. Why wouldn't those be horizontal as well?

A. That is a flat projection, too.

Q. Don't these items here, the cross-buck and the stop sign, extend upward in the same general position as the wig-wag?

A. It could be. It just happened to be put on that way. They would look the same if turned around the other way.

Q. They should, then, be consistent?

(Testimony of William R. Orr.)

A. That is right.

Q. And either all the one way or all the other, is that right? A. That is right.

Q. Now, you have some dotted lines in a little circle over on [212] the right by the station. What is that?

A. A pole and a guy, guy wire for the pole, power pole.

Q. You mean there is a guy wire extending from the pole to the ground? A. Upper one——

Q. This one (indicating)?

A. No, this one, that is the guy and the end of the line is the pole.

Q. The pole there and the guy down there?

A. Yes. The same way with the other.

Q. You have a circle at the point where the guy is and an anchorage at the point where the pole is, is that right?

A. Well, the pole is where the dash is.

Q. That is wrong, isn't it? This should be up where the anchorage is and the anchorage should be down where the pole is, isn't that correct? Maybe you were right the first time. I don't want to mislead you, we just want to get it right. Is that the pole you were talking about there (indicating)? Is that the pole that this little circle is supposed to have located? A. I am just trying to think.

Q. You made all those measurements personally?

A. I did. [213]

Q. Can't you remember back whether there was a pole on one end or the other, or vice versa?

(Testimony of William R. Orr.)

A. The guy is here (indicating). The guys are shown.

Q. Well, that is what I thought. In other words, you have it correct although at first you thought maybe——

A. Yes, trying to say too much.

Q. Now, these other dots that we have along here, those are all single poles?

A. Single poles.

Q. And what is this circle with some projections on it?

A. That is a stand to hang orders for train engine crews.

Q. Is that the semaphore stand (indicating)?

A. A hoop stand.

Q. Now, this hoop stand you are pointing to is between the track on the east and the main line, isn't that correct? You don't show that at all on there, do you?

A. It is in the wrong location, it should be between the main and the siding, or—between the two tracks.

Q. This is an error here?

A. It should be over.

Q. Should be up there (indicating)?

A. That is where it should be on that (indicating).

Q. Well then, tell me where is the semaphore pole?

A. The semaphore is right here (indicating).

(Testimony of William R. Orr.)

Q. Point to it. [214]

A. This is where, the station signal (indicating).

Q. I see, the one you have laying down on the side, the crossing——

A. That is the station signal.

Q. Again, to be consistent, all should be vertical or all should be on their side, is that correct, referring now to the cross-buck and the semaphore here and the wig-wag up here; isn't that right, or ought to, to be consistent? A. Yes.

Q. Yes. That is probably true of these others over here, that is the cross-bucks and stop signs, and the same down here (indicating). Isn't that correct, all ought to be on the side or vertical, isn't that right? Can you answer so that the reporter will get it? A. Yes.

Q. Now, these other black dots we have here on the east side of the east siding, what are they?

A. Western Union poles.

Q. Did I understand from this diagram there is no wig-wag at the Ferry Street crossing?

A. That's right.

Q. And at the North Street crossing you have a double flasher on the west side and on the east side, is that correct? A. That is correct.

Q. Now, you haven't attempted to show any of the improvements [215] on the west side of the highway, have you? A. No, sir.

Q. But there are improvements up there, aren't there?

(Testimony of William R. Orr.)

A. It is undergoing construction now.

Q. Yes, but I mean when the accident occurred. There were some improvements up there, were there not?

A. No.

Q. Weren't there?

Mr. Phelps: Tell him what you mean by improvements.

Mr. Murman: Yes, I will point here. We have a photograph. There were signs and buildings and trees and here are more buildings, and I think if you look down the track, you can get a better view.

The Witness: Pardon me?

Q. You didn't understand improvements?

A. I didn't understand your question.

Q. Something built on the property.

A. It was there, yes.

Q. There were improvements all along there?

A. Yes, definitely.

Q. Just as there were improvements on the east side all around here (indicating) where you saw, Howard Street and Ferry Street and Ferry North, isn't that correct?

A. Yes.

Q. Now, you can take the witness stand. I show you plaintiff's [216] exhibits 3, 4, 5 and 6. Do those correctly reflect the physical arrangement of the various items that you have shown here on the map as of the date you made the map and took the measurements for the map?

A. They do.

Q. All right.

A. As near as I can tell.

Q. As near as you can tell, they do?

(Testimony of William R. Orr.)

A. Yes.

Q. Now, calling your specific attention to plaintiff's exhibit 3 in evidence, can you tell me at about what point that picture was taken in relation to your map here where you show the stop sign and cross-buck? A. No, I couldn't.

Q. You couldn't. Was it taken, as far as you can tell, somewhere in the vicinity of the cross-buck and stop sign that you have shown there on the map at the Howard Street crossing?

Mr. Phelps: The question has been asked; he said he couldn't.

The Court: Well, I will tell Mr. Murman that the same question shouldn't be asked more than twice.

Mr. Murman: I will try not to, your Honor. I think there was an answer to that.

The Court: Yes, there was.

Mr. Murman: I have no further questions of this witness. [217]

Mr. Phelps: I have no further questions. May the witness be excused?

Mr. Murman: He may. I submit to your Honor, except for the right of way area of the railroad, I contend that this map should not be in evidence as the proof of the physical fact. I think it illustrates the area we are interested in, but it has sufficient errors in it so that it should not be accepted in evidence as to proof of the physical fact, and I re-submit my motion to have it introduced only for purposes of illustration.

(Testimony of William R. Orr.)

Mr. Phelps: Will you point out the errors so I can correct them while he is on the stand?

Mr. Murman: The witness has pointed them out.

The Court: He has already corrected them and I don't think it is significant enough for me to rule the map out.

Mr. Murman: I don't want your Honor to rule the map out. I thought it should be in only for illustration, your Honor. That is my position.

The Court: Yes, that is a distinction without a difference, so I will allow it to stand.

Redirect Examination

By Mr. Phelps:

Q. Mr. Orr, the location of the railroad as indicated by these dotted lines at the Howard Street crossing is correctly portrayed, is it?

A. Yes, sir. [218]

Q. And that is from measurements made by you?

A. Yes.

Q. And the point where it turns, is that the point where it joins the regular paved portion of the road shown on the photographs? A. Yes.

Q. At the bottom of the incline to the tracks?

A. Yes.

Mr. Phelps: No other questions.

Mr. Murman: No further questions.

The Court: You may step down.

(Witness excused.)

Mr. Phelps: May I inquire the intention of the court to take a recess before going on to 3:30, so I can time my witnesses accordingly. I don't want to if I can get rid of one——

The Court: I don't think we'd better. We are going to stop here at 3:25.

Mr. Phelps: Fine. Call Officer Sublett.

FLOYD SUBLETT

called as a witness on behalf of the defendant, sworn.

The Clerk: Will you state your full name to the court and jury, please?

A. Floyd Sublett. [219]

Direct Examination

By Mr. Phelps:

Q. Where do you live, Mr. Sublett?

A. I live at 2176 Place Street in Redding, California.

Q. And what is your business or occupation?

A. I am an officer of the California Highway Patrol.

Q. How long have you been such?

A. Since September, 1935.

Q. And how long have you lived and around that part of the state of Redding, Anderson and environs?

A. I have lived within the county all my life with the exception of a year or two working out of the county, away from there.

(Testimony of Floyd Sublett.)

Q. Are you personally acquainted with Mrs. Shanahan? A. Yes, I am.

Q. And are you, were you personally acquainted during his lifetime with Mr. Ellis Shanahan?

A. Yes, I was.

Q. Did you know him quite well?

A. I knew Mr. Shanahan quite well.

Q. And did you know Mrs. Shanahan before ~~she~~ married Mr. Shanahan? A. Yes, I did.

Q. Now then, Officer, did there come an occasion on December 27, 1948, for you to investigate an accident in which Mr. Shanahan was killed? [220]

A. There was, yes.

Q. Will you tell where you were when you received the call advising you of the accident?

A. I was at my home. I received the call from my sergeant and was directed to go to Anderson and investigate an accident that happened on the railroad crossing involving a train and an automobile.

Q. And what time approximately was that call?

A. That was approximately 8:00 o'clock in the morning.

Q. And how long—when, to the best of your recollection, what time did you arrive in Anderson at the scene of the accident?

A. I'd say approximately 8:15.

Q. And when you arrived there first—pardon me,—first, Officer, how did you go there?

A. In the State Patrol car.

Q. In the white cars furnished by the state?

(Testimony of Floyd Sublett.)

A. Black and white car, yes, sir.

Q. As you went there, can you tell us whether or not you used your headlights, that is, for visibility ahead?

A. Well, I believe I used my headlights when I first started out. I had my red light on and as it became lighter, as I recall, I cut down to my parking lights, and the red light, as it shows up more visible.

Q. And how long did it take you to get to the scene of the [221] accident, in minutes?

A. Oh, perhaps, from the time I got the car, about 15 minutes.

Q. All right. Now then, Officer, when you arrived at the accident, what was the first thing you did; tell us.

A. I parked my car, got out and went over. I saw the wreckage of an automobile and saw a body lying on the ground just north of the wrecked car. I immediately went there and touched the man's pulse to see if there was any sign of life. Also checked to find if there was any kind of respiration and attempted to find out whether he had passed away.

Q. And concluded what?

A. It was my conclusion that he was dead at the time.

Q. Now, then, what was the next thing you did?

A. Then I immediately radioed my office and asked them to notify the coroner to come to the scene.

(Testimony of Floyd Sublett.)

Q. At that time there were people around, I presume?

A. There were a number of people when I arrived and other people coming and stopping at the scene during the time I was there.

Q. Were there any other highway patrol officers there at that time?

A. Not right at that time, no, sir.

Q. Any before that, to your knowledge? [222]

A. Not to my knowledge.

Q. Had there been any before in the ordinary course of business of your investigations, would that appear on the reports that you made?

A. I didn't quite understand the question.

Q. If there had been any highway patrol officers who had arrived ahead of you, would that become known to you in the course of your making your report to the highway patrol?

A. Yes, it would.

Q. And did that appear in the records in the report which you turned in? A. No.

Q. All right. Now then, did you inquire at the scene of the accident as to who had witnessed the accident? A. I did.

Q. And what did you find out there and then?

A. I found out that no one present, at least no one present volunteered the information that they had seen it.

Q. All right. Now then, how long did you stay at the scene of the accident?

A. I would say I was right at the scene of the

(Testimony of Floyd Sublett.)

accident until some time after 9:00 o'clock, perhaps about 9:30, and stayed in the vicinity for some time after that as I went across the street after my investigation was complete and had breakfast. [223]

Q. Did you go down to the head end of the train? A. Yes, I did.

Q. And where the engineer and the fireman were? A. Yes.

Q. And except for going down there, up until the time you went to breakfast, were you always at the scene of the accident or down the track where the engine was, is that right?

A. That is right.

Q. Now, do you know Mr. Rowe, a signal maintainer for the Southern Pacific?

A. Yes, I do.

Q. And can you tell us whether or not he arrived at the scene of the accident that morning?

A. Yes, he arrived after——

Q. What time, about?

A. It was after the train that was involved in the collision had proceeded on its way. I would say it was 9:00 o'clock or shortly thereafter.

Q. That Mr. Rowe arrived? A. Yes.

Q. Now then, you say the train proceeded on its way? A. Yes.

Q. That after you had taken charge and given permission for it to leave? A. Yes. [224]

Q. Did you take charge of the investigations then? A. I did.

(Testimony of Floyd Sublett.)

Q. All right. Now, where did Mr. Rowe come from? Did you see him?

A. He came from the south.

Q. On this map from this direction (indicating)?

A. Yes.

Q. And by automobile or by track?

A. On a motorcar on the track.

Q. On the track? A. Yes.

Q. And when he arrived, where were you?

A. I was standing at the crossing.

Q. Now, at the crossing you mean the Howard Street?

A. The Howard Street crossing; yes, sir.

Q. And when he arrived, did he immediately come over to you?

A. He got off his car, walked over to where the crossing was. I walked over and asked him if he was going to test the bell. He said he was. I told him I would like to stay while he tested the bell, which I did.

Q. Was anybody else present when you tested, while he tested the bell?

A. I believe the coroner was. He had arrived in the meantime.

Q. All right, now, will you tell us what was done in testing the bell and what the results of that test were? [225]

A. Well, Mr. Rowe opened up the control that houses the relays that operate the bell and he short-circuited the relays out, the bell started ringing,

(Testimony of Floyd Sublett.)

and I observed the light was lighted, the red light, and the banner of the wig-wag.

Q. That is the red light in the wig-wag was burning? A. Yes.

Q. The bell rang properly?

A. That's right.

Q. And what about the movement of the arm of the wig-wag?

A. It moved as normally should, normally does.

Q. And you tested more than once, he tested it more than once——

A. Yes, he tested, those relays, one for the southbound movement of trains, one for the northbound movement, and he tested it two or three times to see if it would operate each time, which it did.

Q. And from your investigation were you satisfied that the arm, wig-wag arm, and so forth, was in good repair and order? A. Yes.

Mr. Murman: That calls for a conclusion of the witness; object to it on that ground.

The Court: Well,——

Mr. Phelps: He is making an investigation, if your Honor please.

Mr. Murman: This, as I understand it, is a shortening of the relays. That is quite different than running the train. [226]

The Court: I will strike that, I will sustain it.

Mr. Phelps: Very well, your Honor.

Q. Then, do you know what the effect of shorting is across the relays as compared to the effect of the running of the train down the line?

(Testimony of Floyd Sublett.)

Mr. Murman: I object to that as immaterial, if the Court please.

The Court: I will allow it.

A. It produces practically, it produces the same results. In other words, the wires to the relays come directly from the track itself.

Mr. Murman: Now, I move that be stricken on the ground that this witness has not been shown to be an expert in the matter of electric circuits. He was only an investigating officer, and all we are concerned with here is the activation of the wig-wag from a train running on a track, not from shorting of the relay. His statement is a conclusion, and I therefore move to strike his answer.

Mr. Phelps: I will withdraw the question, if your Honor please, and prove it by another witness, if there is any question of that. I don't want there to be any question.

The Court: All right, we will strike it, the question and answer, out.

Mr. Phelps: All right, it can be proved by another witness. [227]

Q. Now then, may I ask you this: Did you make any other observations of your own with respect to the working of that wig-wag signal on that day?

A. Yes, on two occasions I checked the operation of it while trains were passing the point and approaching the wig-wag.

Q. And did it operate correctly on that occasion? A. It did.

Q. And will you tell us whether that was for a

(Testimony of Floyd Sublett.)

movement—when the train moved over the main line?

A. Yes, it was a train moving through and passing right on through the town of Anderson in both cases.

Q. Can you tell us whether it was from the north or from the south?

A. The first train was a freight train from the north. The second train was a train, No. 16, from the south.

Q. And you made those observations yourself that morning? A. I did.

Q. As a part of your investigation?

A. It was that day.

Q. It was that day? A. Yes, sir.

Q. Was that before or after you left the scene of the accident, do you remember?

A. After I left the scene of the accident.

Q. Came back? [228]

A. Well, I was patrolling that beat past Anderson during the day.

Q. And it was just a happenstance?

A. No, it was my thought to check that as to get an accurate check of the working operation of it.

Q. All right. And so that showed the actual working operation with a train on the track?

A. Yes.

Q. And the same—it was the same results as the test with shorting it through the relays?

A. Yes.

Q. The wig-wag moved back and forth, the light

(Testimony of Floyd Sublett.)

burned and the bell rang? A. That's right.

Q. Now, then, in the course of your investigation, did it ultimately come to your attention that a Mr. Hewes, a Mr. DeRosa, were said to have seen this accident? A. Yes.

Q. And in the course of your investigation did you have an occasion to interview these two men?

A. I did.

Q. Can you tell us where it was and when that was?

A. It was in the highway patrol office in Redding, I believe, the following day. I am sure it was the following day after the accident. [229]

Q. The day after, the 28th of December?

A. Yes.

Q. 1948. Who was present?

A. Captain Foster, my superior officer.

Q. Anyone else?

A. No one else right close. There were other people in and out of the office, other employees in the vicinity.

Q. And in the course of your investigation of this accident, did you interview those two men?

A. Yes.

Q. And in the presence of Captain Foster?

A. Yes.

Q. And in the course of that investigation did Mr. Hewes tell you that he didn't know whether the wig-wag was working or not?

A. Yes, he told me that.

Q. Did Mr. DeRosa tell you that also?

(Testimony of Floyd Sublett.)

A. He also told me that he didn't know.

Q. And that he didn't look?

A. That's right.

Q. And the same is true with Mr. Hewes?

A. Yes.

Q. Now, then, as a result of your investigation, was any citation issued to any member of the train crew?

A. No, there wasn't. [230]

Q. Was there any action at all taken on the recommendation of the highway patrol?

A. No.

Mr. Murman: Now that is immaterial, if the Court please, what action was taken by the highway patrol. That doesn't bear on the negligence here.

Mr. Phelps: We won't press it.

The Court: All right.

Mr. Phelps: I think that is all, your Honor.

Cross-Examination

By Mr. Murman:

Q. When you left your home that morning in response to that call, what was the weather on that day?

A. It had been raining, the highway was still wet. It wasn't raining at the time; however, the windshield collected a sort of mist during the course of travel.

Q. Did you have to use your windshield wipers?

A. Well, I don't recall whether I had to use them or not. I know the air was moist. It was cloudy, low-hanging clouds and later, a little later in the day, it rained some more.

(Testimony of Floyd Sublett.)

Q. You got to the scene of the accident about 8:15 as I understand it?

A. That is as near as I can place the time; yes, sir.

Q. And did you learn afterwards that the collision occurred about a quarter of eight, in that neighborhood?

A. Approximately 7:47. [231]

Q. Yes. You got there just about a half hour afterwards, is that correct?

A. Some 25 minutes to a half hour, yes.

Q. Now, did you ascertain the point of the collision in your investigation?

A. Well, the front end of the train struck the right-hand side of the car to the rear of the door, the rear of the right-hand door.

Q. What kind of car was it?

A. It was a 1937 Plymouth coupe.

Q. Was the impact—the impact of the car was to the rear of the single door on the right-hand side, is that right?

A. Yes, that is the main portion of the impact.

Q. And where in relation to the crossing, itself, did the impact occur, or did you ascertain that?

A. There was no way to tell exactly. The only marks I saw was the gravel off of the roadway, and, as I said, the roadway was wet and when I arrived there were no marks on the roadway itself to tell the exact position of the car itself in relation to the right or left-hand side of the roadway.

Q. The marks in the gravel, were they to the west or to the east?

(Testimony of Floyd Sublett.)

A. They were to the west.

Q. To the west? A. Yes. [232]

Q. Were they beyond the switch or somewhere between the switch and the crossing?

A. There was one mark just off the roadway, perhaps not more than a foot.

Q. Could you come down and mark that for us here?

(The witness left the stand and went to the blackboard.)

Q. Do you understand the map, officer?

A. I take it this is the station?

Q. Yes.

A. Anderson; and this is the crossing?

Q. As I understand the map, north is the right, south to the left, west to the top, and east to the bottom, as a general directional marking.

A. Yes. As near as I can place that, there was a marking right off the roadway near the rail, the nearest marking to the crossing that I found.

Q. Is that about correct?

A. That is about right.

Q. Right here.

Mr. Murman: I will mark that "S-1," your Honor.

The Court: Yes.

Q. (By Mr. Murman): The other markings were further to the south?

A. Yes, between here and a point some 100 feet to the south and a short distance to the west of the main line track. [233]

(Testimony of Floyd Sublett.)

Q. Where did you find the car with relation to the crossing, about how far south?

A. Approximately 100 feet. Now, I stepped that distance off. I didn't have a tape line with me at the time.

Q. And the body, was it between where the car was and the crossing?

A. Yes, the body was just a short distance north of the car.

Q. You have indicated the general area right near the switch standard here. Is that about where you recall finding the body and the car?

A. It was far enough away from the switch standard out there, some, I believe, 30 to 35 feet from the track. I never placed the switch standard as a mark, I couldn't say, but I did step the distance from the crossing to the car which I estimated at that time to be approximately 100 feet.

Q. As I understand your answer, then, in relation to the switch standard you can't mark where you found the body, on this map?

A. No, not in relation to the switch standard.

Q. Can you state the distance with relation to this pole that has been designated here, which is a little bit further to the south?

A. No, I don't recall whether that pole was north or south of the car.

Q. All right, that is all right. Your best recollection is [234] that the car was about 100 feet south and to the west of the right of way?

(Testimony of Floyd Sublett.)

A. That is right.

Q. And the body a little short of that?

A. The body a little short of that, yes, sir.

Q. Thank you, Officer. Will you take the stand again, now?

(The witness resumed the stand.)

Q. Now, we have a picture here of a wrecked automobile, Plaintiff's Exhibit 7. I will ask you to look at that and state whether or not that appears to be a picture of the automboile as you saw it. Of course, it is in a little different location there. I am just asking you to look at the automobile now.

A. Yes, I realize that, sir. Yes, it looks to be the same car, approximately the same damage.

Q. According to your statement the impact took place somewhere to the rear of the right door, is that right?

A. Yes. Well, right in that vicinity where the dent is in the frame.

Q. Can you mark that?

A. (Marking exhibit): That is approximately, or as near as I can.

Q. Just put a cross there.

Mr. Murman: That cross, your Honor, is being placed near the rear right wheel on Plaintiff's Exhibit 7. [235]

Q. You said you went down to the head end of the train and saw the engineer and fireman?

A. Yes.

Q. Did you have any conversation with either of them?

(Testimony of Floyd Sublett.)

A. Yes, I asked the engineer what speed he was traveling.

Q. What did he say?

A. He said approximately 70 miles an hour. That was his speedometer reading.

Q. Was there anything else said at that time?

A. I asked him if he saw the car before the crash. He said no, he didn't, the car come from the opposite side of the train, and his first warning of it was when the fireman called to him to stop the train, or some words to that effect. In other words, the fireman gave him the information that he was to stop.

Q. Was there anything said about the wig-wag by the engineer?

A. Well, I can't seem to recall just what he said on that. Perhaps I asked him, and I am not quite positive about it.

Q. Didn't he say he didn't see it operating?

A. Well, as I say, I don't know whether he did.

Q. What is your best recollection?

A. Well, I don't recall that conversation regarding a wig-wag, whether or not I talked to him about it. I possibly did. I may have asked him about it.

Q. You have some recollection that you did talk to him about [236] it, is that correct? It isn't very clear in your mind, but you have some recollection?

A. That is right.

Q. And you can't tell us now whether he didn't say, as a matter of fact, that he didn't see it

(Testimony of Floyd Sublett.)

operating? You can't tell us that to be his answer, is that correct?

A. No, I can't seem to recall the conversation on it. I probably, without doubt, did ask him about it.

Q. But you don't recall his answer?

A. No, I don't right at the present.

Q. That is one of the rather important elements of your investigation, wasn't it?

A. Yes, it is.

Q. And you talked to the engineer, the only member of the crew, of that crew, which was on the right-hand side, same side that this wig-wag was on, and you can't recall his answer to that question?

A. No, I am sorry, I don't know what his answer was and I am not quite sure whether we talked about it or not. I believe we did.

Q. Did you make a report in which you set forth what information you got from the various persons you talked to?

A. Yes.

Q. Where is the report?

A. I have no report on that with me, I am sorry.

Q. Is there a report on it?

A. Yes, there is a report, perhaps, in my notebook.

Q. Where is your notebook?

A. It is in Redding.

Q. Can you get that down here?

A. Well, possibly can in time.

Q. I think we should have your record to refresh your recollection, to see whether you made a nota-

(Testimony of Floyd Sublett.)

tion on that subject. Do you think you can do that?

A. Possibly can.

Q. Before you came down here to testify, didn't you go over your notebook?

A. Well, I checked my notes some time back on it and when I came down here to testify I didn't know I was coming at the time that I did leave until just shortly before I left.

Q. Did you just get here today?

A. No, sir, I didn't; I came down a couple of days ago.

Q. And you brought nothing with you in the way of notebook or reports that you made in connection with your investigation, is that right?

A. No, I didn't, I am sorry.

Q. Do you remember talking with Mr. Wickfield of the Bureau of Internal Revenue?

A. Yes.

Q. You see him here in the court room, don't you, sitting back [238] there? A. Yes.

Q. Do you recall any conversation with him about what the engineer said about the wig-wag?

A. Yes, we were talking about it.

Q. But you can't tell us now?

A. We talked about all phases of the accident.

Q. But you can't tell us now on this very vital point what that engineer said to you about him seeing the wig-wag or not seeing it, whether it was operating or it not operating?

A. I am sorry, but I just can't recall.

Q. Don't you also remember that when you

(Testimony of Floyd Sublett.)

talked to Mr. DeRosa and Mr. Hewes they said they didn't see the wig-wag operating? A. Yes.

Q. So it wasn't that they were not sure whether it was operating or not, but they didn't see it operating, is that correct?

A. They said they couldn't tell me whether it was operating or wasn't.

Q. Didn't they also say they didn't see it operating? A. They said they didn't look.

Q. Both of them said they didn't look?

A. Mr. DeRosa or Mr. Hewes, rather, told me that he didn't see it, he didn't look. I asked Mr. DeRosa if he saw whether it was operating or not, and he said, "No, I didn't look, either." [239]

Q. Both of them said they didn't look?

A. Yes.

Q. But in addition to that they said they couldn't tell you whether it was operating or not?

A. That is right, they said they couldn't tell me.

The Court: Well, it is getting to be 3:35 now.

Mr. Murman: I am not through with this witness, I am sorry.

The Court: No. If that is true, he will have to be back here Tuesday. We will adjourn now until Tuesday morning at 10:00 o'clock.

Mr. Murman: May I ask your Honor to instruct the witness to return at that time with his notebook?

The Court: Yes. You could return at that time?

The Witness: What time was that, sir?

(Testimony of Floyd Sublett.)

The Court: Next Tuesday morning at 10:00 o'clock.

The Witness: Tuesday morning at 10:00 o'clock.

The Court: We will adjourn now, and during recess, ladies and gentlemen, bear in mind the admonition that the Court has heretofore given you, and I wish you all a very happy holiday.

(Thereupon, an adjournment was taken to Tuesday morning, December 27, 1949, at the hour of 10:00 o'clock.) [240]

December 27, 1949, at 10:00 o'Clock

(The following proceedings were had in chambers.)

The Court: Let the record show counsel are here in chambers talking to the judge about a certain incident that occurred on Thursday afternoon when the jury was discharged for over the Christmas holidays. As I understand it, when the jury was passing out of the court room, several of them had already stepped through the door, the plaintiff arose and simply said, "Merry Christmas" to them, or words to that effect.

Mr. Murman: I didn't hear it, Judge. I was busy and when Mr. Phelps called it to my attention I immediately went over and asked Mrs. Shanahan if she had said Merry Christmas and she said, "Yes," and with that she more or less broke down and wept and said she didn't know she was not supposed to.

Mr. Phelps: What happened was this, that as they were leaving, a bunch of them were still in the court room, and some may have left (I don't know how many were still in the court room) but at any rate, as they were leaving the box and were filing out, Mrs. Shanahan left her seat, which was behind the railing,—which, incidentally, is the only time I know of during the trial except when she took the stand—walked rapidly up to intercept the jury as they were leaving the door, approached them, and as nearly as I can remember the [241] exact words, they were “Merry Christmas to all of you folks.”

Your Honor, that may sound like an innocuous thing. Maybe it is and maybe it isn't. But at the moment it had me very much upset, and the more I thought about it over the holidays the more I am compelled to ask the court to declare a mistrial in this case. I am afraid it is highly prejudicial. Your Honor has tried many cases and you are perfectly well aware, you know perfectly well, as I do, one of the things we try to avoid in these cases is a so-called “Christmas verdict”; that is to say, the question of Christmas holidays entering into a verdict. This case is one of those cases where an incident like that, and I say to your Honor that it is a death case in which sympathy naturally can enter into it. It is a death case against a large corporation. It is a death case in which, admittedly, our engine was going at a high rate of speed, 70 miles an hour, legal, lawful rate of speed, but the jury might—it is a case in which it is a very close question on the facts. Plaintiff has produced two witnesses

whose testimony would leave the inference that at the time the wig-wag was not working, the bell was not sounded, the whistle was not sounded. We have evidence to the contrary, but it is a close question on all issues.

I think the only thing which should be done in this case is to discharge the jury and commence again after the holidays. [242] We can never say how much that could affect the jury. It wasn't just "Merry Christmas." I want to say it was one of those things that will probably leave the impression, "You could make it a Merry Christmas for me." Maybe she did not intend it that way, but it wasn't a question of intent but of what was said.

I was upset at the time. Now I am not upset about it, I am just definite that it would be prejudicial. I think it would be prejudicial to the defendants in this case, and I think——

The Court: Let me state what I understand the facts to be from Mr. Schaeffer, the Clerk, who was standing right here. He says that a great many of those jurors, as I understand it, had reached the doorway and most of those had——

Mr. Schaeffer: A few had gone out, I don't know how many, but Mrs. Shanahan leaned forward and said, "Merry Christmas to you folks," or "Merry Christmas to all you folks" (I don't remember exactly), but I saw her face and it was as if she was just a person wishing Merry Christmas. But she did lean forward from here to, I would say, the desk from the rest of the jurors. One of them, I think, said, "Thanks" or "Merry Christmas to you," but the others I don't think heard it. The

rest of them had gone out, I don't know how many.

Mr. Murman: I didn't hear it at all and I was standing a few feet away. But I checked the law over the Christmas [243] holidays, and if she had discussed the case, anything about the case, that would have been one thing, but as I have noticed in the cases mere salutations which, of course, this was, is not prejudicial if there was nothing in it that discusses the facts or circumstances of the case. I asked Mrs. Shanahan afterwards, "Why in the world did you do that?" You know you are not to talk to the jury." She said, "I heard the Judge say Merry Christmas and I said Merry Christmas. It came out of me before I thought." The poor woman was upset and crying, and I felt terrible, of course. If the law holds that a mere salutation is prejudicial, then this perhaps would follow that category; but there are many cases where a party has just said "Good morning" to a jury, and that is not prejudicial. Nothing prejudicial about being pleasant.

The Court: You have made your point, Mr. Phelps. The way I feel about it is that I said, as I admonished the jury when they left the box, "I hope you have a very happy holiday——"

Mr. Murman: Something like that.

The Court: That statement of hers was, I think under the circumstances, really innocuous. It wasn't intended to influence them in any way. It was made at a time when everybody was saying the same thing to everybody else. I don't feel that I will grant the motion. I think I will deny the motion and go ahead with the trial.

Mr. Phelps: What I want, if your Honor please,

is that the [244] record may show that I had no opportunity to call this to your Honor's attention, that is formally, at the time of the occurrence, but immediately did it in chambers, that I took it up at the very first opportunity afterwards this morning.

The Court: Yes.

Mr. Phelps: I am not going to argue the matter to your Honor. Your Honor has ruled. But I want to call your Honor's attention, that was the impression that was left throughout the holidays. I stand there right alongside of her, and knowing the rules of the court, I can't wish them a Merry Christmas and don't wish them a Merry Christmas. The contrast is there. I don't see how your Honor can escape the fact that no harm can come by starting this case over again, and if your Honor is disposed to grant a mistrial should we shoulder the cost of trying it, the Southern Pacific would do that. I feel that strongly about it. I don't feel that we should do that, but——

Mr. Murman: If Mr. Phelps can find a single case which says a salutation, something which is not a matter of prejudice and no facts involved, that is one thing, but in the case that I could find the mere salutation and pleasantries between the jury or a party and counsel are perfectly proper.

The Court: I feel that way about this, so I will deny the motion.

Mr. Phelps: We take an exception, if your Honor please. [245]

The Court: All right, let's get started.

(The following proceedings were had in the court room before the jury.)

Mr. Murman: I believe Mr. Sublett was on the stand when we terminated last Thursday, your Honor.

LLOYD SUBLETT

recalled, previously sworn.

Cross-Examination
(Continued)

By Mr. Murman:

Q. Officer Sublett, I believe on Thursday, if I remember rightly, you were going to go back to Redding and examine your records about whether or not the engineer did not say to you that he did not see the wig-wag signal. Did you do that?

A. I did. I have my notes and my report with me.

Q. Have you examined them yourself?

A. Yes, sir, I have.

Q. Is there anything in there on that subject?

A. There is.

Q. May I see the report, then?

A. Yes, sir. Would you like to have me show you the place?

Q. Yes, if you will, please. Speak loudly enough so we can hear you. What is this you have in your hand now?

A. That is the notes I took at the time of the accident. I wrote them in my car immediately after talking to Mr. Stainbrook, [246] the engineer, and Mr. Kafer, the fireman.

(Testimony of Floyd Sublett.)

Q. These notes are dated the following day. Those were notes taken the following day?

A. Taken from Mr. DeRosa and Mr. Hewes.

Q. Will you point out in there what portion bears on that subject?

A. I have a notation——

Q. Just point it out to me——

Mr. Phelps: May I see it, too?

Mr. Murman: It is on page No. 3.

A. Yes, sir.

Mr. Murman: Both Mr. Phelps and myself have read this portion which relates to what the engineer told you, is that correct? A. Yes.

Q. That was at the time of the accident?

A. At the time and within a minute, within a matter of minutes after the accident that I went to my car from the engineer and I made the notes.

Q. According to your best recollection, is that about what he said as you wrote it down there?

A. Yes, that is approximately what he said.

Q. Can you read it to the jury as you have it there?

A. In reference to Mr. Stainbrook's statement I have a note that, "Did you notice crossing bell as he was too busy at [247] that time." That was at the time of the collision.

Q. Is that what he said? You just have "at that time." A. Yes.

Q. You added, "At the time of the collision?"

A. That is right.

Q. Did you talk to the fireman?

(Testimony of Floyd Sublett.)

A. I talked to the fireman.

Q. Did he make any statement about the crossing signal?

A. As I understand, he said he didn't see it, he was on the opposite side of the engine.

Q. Have you anything in your notes on that?

A. I don't know whether I have or not. Yes, "I did not see crossing bell. I was on the left side." Those are my notes.

Q. Those are substantially his words, is that correct? A. Yes.

Q. Did you talk to any other persons of the train crew concerning the crossing signal, or were those the only ones?

A. Those were the only ones. I had talked to the conductor around the scene of the accident but I don't believe I questioned him on that. I assumed he was not in any position to see it. I doubt if I did question him about that.

Q. I will return these to you temporarily. I may want to look at them again, so will you hold them handy? A. All right.

Q. I believe you stated that when you found the wreck of the [248] car—can all the jurors see the blackboard?—when you found the wrecked car it was to the west of the main line some 120 or 130 feet beyond the crossing, to the south of the crossing, is that right?

A. West of the main line, yes, sir.

Q. When you looked at the car, Mr. Sublett, did you look at it carefully or just glance at it?

(Testimony of Lloyd Sublett.)

A. I merely glanced at it at first. I did look it over quite thoroughly afterwards.

Q. How long afterwards did you examine it thoroughly?

A. It was before the car was moved.

Q. Same day as the accident?

A. Yes, perhaps within an hour or an hour and a half.

Q. I show you plaintiff's exhibit 7, in evidence, which I think you have seen before.

A. Yes, sir.

Q. A picture of the wrecked car, isn't it? I call your attention to the front, right glass window on the door.

A. Yes.

Q. You see here the window is down. Can you see that? You can see the reflection on the glass and it shows it is down about half the distance.

A. I see the reflection.

Q. Don't you see a line there in the glass running through there? You can see the curved portion. It follows the curved [249] portion of the door frame itself.

A. Looks like glass.

Mr. Phelps: May I see that?

Q. (By Mr. Murman): Having that in mind——

Mr. Phelps: Oh, that is all right.

Q. When you looked at the car was the right window down?

A. Not the right window, no.

Q. Was there another window that was down?

A. No, I do not know of any window that was down.

(Testimony of Lloyd Sublett.)

Q. It is your testimony, then, that the picture here shown of the window being partially down was not the condition as you saw it at the time you carefully looked over the car?

A. Is that the right window?

Mr. Phelps: May I see the photograph?

Mr. Murman: Well, the car was struck——

A. Yes, take a look at it.

Q. (By Mr. Murman): The car was struck, was it not, as it was going from east to west?

A. That is right, it was.

Q. I am sorry. I am sorry. The car was struck on the right-hand side, wasn't it?

A. Yes.

Q. It was the driver's side of the car that was away from the collision? A. Yes. [250]

Q. That would be the left side?

A. That would be the left side.

Q. I am sorry, I had my right and left mixed up temporarily. Calling your attention to this same photograph, that is the left door, isn't that correct?

A. Yes, I took that to be the left door.

Q. Yes, I think that is right.

Mr. Murman: Your Honor, now, in the photograph it shows the window down partly.

Q. Was that window in that condition when you looked over the car?

A. I don't believe it was, sir.

Q. Did you try the door to see whether or not the window could be raised and lowered?

(Testimony of Lloyd Sublett.)

A. No, sir, I didn't. I merely observed it at the time I looked it over.

Q. It is your recollection, is it, that the window was all the way up?

A. That is my recollection.

Q. But you didn't try the window to see if it could be moved at that time?

A. No, I did not.

Q. Did you note the condition of that left door as to whether it was damaged in any way?

A. As I recall, it was damaged. The door was open, could not [251] be closed, that is the left door. The right door was completely damaged. But I am quite sure the left door was dented up considerably.

Q. Dented up in the body portion of the door itself, that is, below the window? [251A]

A. I don't recall the exact damage to it, I am sorry.

Q. How about the light switch in the car itself? Did you check that?

A. The light switch, as I recall, was off at that time. I couldn't see anyone, that is, at the time of my arrival I couldn't find anyone who stated he turned it off or that it was not turned off. I really don't know.

Q. Then, when you arrived there, the tail light was not burning, is that correct?

A. No, it wasn't.

Q. You said that subsequently that same day you came by when a freight train was coming from the north, and at that time this signal was in operation,

(Testimony of Lloyd Sublett.)

the one at the Howard Street crossing, is that correct? A. Yes, that is right.

Q. When you got there was that signal light in operation or did you arrive before the train was there?

A. No, I knew there was a train coming. I was starting north out of Anderson and saw this train coming and I turned around and went back to the signal and waited.

Q. It was coming rather slowly, was it, as freight trains sometimes do?

A. It was coming possibly 40 miles an hour, 45.

Q. You did get here before the train arrived, is that correct. A. I did. [252]

Q. Where were you standing when you observed the operation of the signal as the train approached?

A. I wasn't standing. I was sitting in my patrol car across on the west side of the highway in front of the Standard service station.

Q. On the west side of Highway 99?

A. Yes.

Q. Were you headed south then?

A. I wouldn't say for sure. I believe I was.

Q. Where were you standing, then, on the west side of that Standard service station just about opposite the Howard Street crossing?

A. Just about.

Q. Where you were seated at the west in your car, did you look up the track and see the train approaching?

A. I watched the approach of the train to deter-

(Testimony of Lloyd Sublett.)

mine whether or not the bell started ringing a reasonable distance, when the train was a reasonable distance away.

Q. Where was the train when the bell started ringing, approximately?

A. I couldn't say exactly the point. It was well up into the yard north of—I believe north of the North Street crossing.

Q. North Street crossing—is this crossing at the righthand side of the picture, the map, isn't [253] that correct? A. That is right.

Q. You say it was north of that?

A. Yes.

Q. Do you have any idea how far north? In other words, was it two or three car lengths north of North Street, to the north of the Ferry Street crossing, putting it about right here on the map? Or was it further than that?

A. I couldn't say offhand the exact location. I don't believe it was too far north of that crossing.

Q. You say "too far." A. Well,—

Q. In other words, to get it a little more exact than that, was the train one block further, or less, or more?

A. I could only estimate according to my best recollection as probably near a block or less.

Q. There would be, taking the distance approximately between North Street and Ferry Street, it just came in there to the right? It would be somewhere out here (indicating)?

A. Somewhere out there, yes.

(Testimony of Lloyd Sublett.)

Q. Beyond the right side of the map, is that correct? A. That is right.

Q. Was there anything on this right passing track, that is, the west passing track?

A. Not at that time, no; there was no other train in there.

Q. Then, as the train approached from where it was north of [254] the North Street crossing, you noticed the signal start to operate?

A. Yes, sir.

Q. And your recollection is certain that there was no waiting freight on the west siding here at that time? A. No, I am sure there wasn't.

Q. Now, going back to the engine crew for a minute again, did you have any conversation with either the fireman or engineer as to the sounding of the whistle?

A. They both said the whistle was sounded several times coming into Anderson and it was sounded for that crossing, according to their statement to me.

Q. The statement to you was that it was sounded several times coming into Anderson?

A. Yes, for other crossings as well as that one.

Q. Then it was sounded at the Howard Street crossing? A. Yes.

Q. Do you have notes in there on that?

A. I don't know whether I have or not.

Mr. Murman: May the record show, your Honor, the witness is examining his report that he previously referred to as having been made by him at

(Testimony of Lloyd Sublett.)

the time of the investigation at the scene of the accident.

The Court: All right; it may so show.

A. No, I do not have a note to that effect. [255]

Q. (By Mr. Murman): That is true as to the engineer and the fireman?

A. As to the statement of a whistle, no, sir.

Q. It is your recollection that they stated just as you previously answered my question, is that correct?

A. Yes.

Q. And did they say, either of them say, they saw the car prior to the collision, that is, the car in which the deceased was riding.

A. The fireman——

Mr. Phelps: May it please the Court, for the record I want to object to that as calling for hearsay testimony, not binding on the defendant the Southern Pacific Company. These are not parties, that is, the fireman or the engineer, to this action.

Mr. Murman: They are employees, aren't they?

Mr. Phelps: That is correct.

Mr. Murman: Then, as I understand the witness' testimony, that is a statement made right at the scene of the accident when he first questioned them.

Mr. Murman: Isn't that correct, Officer?

A. Yes.

Mr. Murman: I think it is admissible.

The Court: I think I will allow it.

Mr. Phelps: If you are talking about the res gestae, I think it [256] would be without foundation

(Testimony of Lloyd Sublett.)

because it was at least a half hour after the accident. I know of no case that goes beyond that. I make the point for the objection.

Mr. Murman: Plenty of those. There are even spontaneous exclamations under the cases.

Mr. Phelps: I submit it for the Court's ruling.

The Court: I think it is a little remote. I think, if that be the case, it is too remote to be part of the *res gestae*. The statement wouldn't be binding on the defendant.

Mr. Murman: If the Court please, it is right after the officer got there that you talked to the engine crew, isn't that right?

A. After I got to the engine.

Mr. Murman: How long after you arrived there at the scene?

A. It was after the coroner arrived. It would be perhaps half an hour after I got to the scene of the accident.

Mr. Murman: Is Your Honor ruling then, that the objection should be sustained?

The Court: Yes, I will sustain the objection.

Q. (By Mr. Murman): Now, you said on your direct examination, Officer, that you had known the deceased quite well. I think those were your words?

A. Yes.

Q. How long had you known him? [257]

A. I had known him personally perhaps for twelve or fifteen years.

Q. At the time of his death, how long prior to that time had you seen him last?

(Testimony of Lloyd Sublett.)

A. Well, I used to see him almost every week. I don't recall the last time I actually saw him prior to that. It was probably, could probably have been, perhaps a week or two prior.

Q. Was he in apparently good health when you saw him? A. Yes.

Q. Did you know his age or not?

A. I knew his approximate age.

Q. You knew he was in his fifties, is that correct? A. Yes.

Q. Had you observed him driving on the highway during that 15 year period you mentioned.

A. Yes, I observed him a number of times.

Q. About how often would you say?

Mr. Phelps: I will object to that as incompetent, irrelevant and immaterial; and if it is preliminary, it would be to the same point of my objection which has already been ruled on.

Mr. Murman: No, this is a different point. If there is any objection, I think that would go to the foundation of the question. I can't develop that this witness is an expert. I will reframe the question so there is no mistake about it. [258]

Q. Officer, how long have you been a member of the California Highway Patrol?

A. Since September, 1935.

Q. You said, I believe, you had been stationed in the Shasta area for some time prior to the accident, had you not?

A. I have been stationed in the Shasta area all

(Testimony of Lloyd Sublett.)

that time with the exception of short details away from there.

Q. Just temporary assignments elsewhere?

A. Yes.

Q. Now, it is part of your duties to observe how persons operate their vehicles on the highway?

A. It is.

Q. And you make those observations daily, do you not? It is part of your duties, is it not?

A. Yes.

Q. So as to determine whether or not an operator operating his vehicle on the highway is operating it in a lawful manner, isn't that so?

A. Yes, that is right.

Q. And also in a careful manner? A. Yes.

Q. You have seen Mr. Shanahan, you said, on an average of about once a week during that time you knew him? A. That is right.

Q. When you saw him on those occasions, was he operating a [259] vehicle. Now, then, I imagine you didn't see him always in his automobile, but did you see him operate a vehicle?

A. I saw him occasionally, yes.

Q. When you say occasionally, how often would you say, once a month, once every two weeks, or——

A. That is hard to say exactly.

Q. I don't want it exact. Approximate.

Mr. Phelps: I submit, may it please the Court, all this is incompetent, irrelevant and immaterial.

Mr. Murman: This defense is that this man was operating a vehicle in a negligent manner at the

(Testimony of Lloyd Sublett.)

time of the accident. I think it is competent evidence and can be shown by this witness that he was not that sort of a driver.

Mr. Phelps: You have already ruled on that.

The Court: I have already ruled on that.

Mr. Murman: That is as to the crossing. I am speaking of his general conduct, not the crossing.

Q. (By Mr. Murman): You never did see Mr. Shanahan cross this particular crossing, did you, Officer? A. Not that I recall.

Q. The way you observed him was on the highway? A. Yes.

The Court: I think that is immaterial and I wouldn't pursue it, counsel.

Mr. Murman: All right, Your Honor, I bow to the Court's [260] ruling. I have no further questions.

Redirect Examination

By Mr. Phelps:

Q. Officer, may I see your notes, please?

A. Yes, sir. [260-A]

Q. Officer, you handed me some notes—you have handed me a California Highway Patrol vehicle accident report. Is that the report which you turned in on this accident? A. It is.

Q. Is that the original?

A. That is the original draft of the report.

Q. And does that bear a signature of anyone besides yourself?

A. It bears the signature of my superior officer, Captain Foster.

(Testimony of Lloyd Sublett.)

Q. And yours? A. And myself.

Q. And is this the final report that is filed with the California Highway Patrol on this accident?

A. It is the original report, yes.

Q. And there is a yellow page, is that part of your report, Officer, that is attached to it?

A. That is supplementary to the original.

Q. Your stating in this report——

Mr. Murman: Now, just a moment, if the court please. I am going to object to any reference to any statements made in the report as being heresay, not being binding on the plaintiff, not being within the issues of the case, and certainly counsel can't impeach his own witness.

Mr. Phelps: I am not asking to impeach, if your Honor please. He has gone into the matter here, the window was up [261] or down. Now, I want to go into the matter of showing what his opinion and conclusion was at that time, as recorded at that time.

Mr. Murman: We have already had the witness' testimony and this is the witness' own report; therefore, it is not admissible in this case.

The Court: I think I will sustain the objection.

Mr. Phelps: Very well. I was going to offer the entire report in *office*. I thought perhaps you would stipulate the matter go in——

Mr. Murman: No, I am not going to stipulate.

Mr. Phelps: ——made on the 28th, a report on this accident.

Mr. Murman: You know it isn't evidence unless it is to impeach.

(Testimony of Lloyd Sublett.)

Mr. Phelps: You won't stipulate?

Mr. Murman: No, I won't stipulate. You have the witness here, you can ask him the question.

Mr. Phelps: I will call your attention to the final conclusion, the last sentence of your report. Just read it to yourself.

(Witness reads report.)

Q. Now, officer, having refreshed your recollection from the report itself, is there anything about it which would change your opinion heretofore expressed as to whether or not—your opinion was that the window, the windows of this vehicle [262] were closed at the time of the accident?

Mr. Murman: At the time of the accident, or at the time of the investigation?

Mr. Phelps: At the time of the accident.

Mr. Murman: I submit that calls for a—is purely a conclusion, if the court please.

Mr. Phelps: I will withdraw that.

Q. At the time he made the investigation.

The Court: You had better reframe that.

Mr. Phelps: Very well.

Q. Having reviewed your report, Officer, is there anything contained in your report, is there anything which would lead you to change your opinion heretofore expressed that at the time of your investigation of the Shanahan *car* were closed?

A. According to my report, it was my conclusion the right-hand window was closed.

Q. And as far as the lefthand window is con-

(Testimony of Lloyd Sublett.)

Q. And yours? A. And myself.

Q. And is this the final report that is filed with the California Highway Patrol on this accident?

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A. According to my report, it was my conclusion the right-hand window was closed.

Q. And as far as the lefthand window is con-

(Testimony of Lloyd Sublett.)

cerned, your observation is that at the time you investigated it, your observation was that it was up, is that correct? A. Yes.

Q. Now, then, you were asked about your notes, Officer, and I am only now referring to the portion you read. A. Yes.

Q. And there is this in your notes, "Did you notice," (Stainbrook) "did not notice (the) crossing bell as he was too busy at [263] that time." You recorded that after going to the automobile and sitting down?

A. When returning to the automobile from the engine, the locomotive.

Q. Now, having refreshed your recollection from these notes, can you give us a little more accurately as to what he said in that respect, how he said it?

Mr. Murman: If the court please, the witness has already testified those are substantially the words and counsel asked can you give it more accurately. I submit that is leading and suggestive, it suggests to the witness that what he has given as an answer already is not an accurate answer and I think it is prejudicial and misconduct on the part of counsel.

Mr. Phelps: I will withdraw it. I will submit, your Honor. But I will withdraw the question.

The Court: I don't consider it as misconduct at all.

Mr. Phelps: The point I am getting at is simply this: Having refreshed your recollection from these notes as to what you then recorded, can you tell us—

(Testimony of Lloyd Sublett.)

if you can; if you can't tell us, you can't—just whatever your frame of mind now is, referring back, can you tell us as closely as you can the words that Mr. Stainbrook used on that occasion?

A. As I recall the exact wording, his answer to my question as to whether or not he observed the bell, his answer was "Hell, no, I was too [264] busy."

Q. That is your recollection?

A. That is my recollection of the exact wording.

Q. By the way, officer, you appeared here in response to a subpoena, did you not?

A. Yes, sir.

Mr. Phelps: I have no other questions.

Mr. Murman: No further questions.

Mr. Phelps: May this witness be excused?

Mr. Murman: Yes, as far as I am concerned.

Mr. Phelps: The court will excuse this witness?

The Court: Yes.

(Witness excused.)

Mr. Phelps: Call Mr. Luddon.

JAMES R. LUDDON

called as a witness on behalf of the defendant,
sworn.

The Clerk: Will you state your full name to the court and jury, please?

A. James R. Luddon.

(Testimony of James R. Luddon.)

Direct Examination

By Mr. Phelps:

Q. Mr. Luddon, where do you live?

A. Dunsmuir, California.

Q. By whom are you employed?

A. Southern Pacific Company.

Q. And in what capacity? [265]

A. Rodman in the engineering department.

Q. And as a rodman for the engineering department, it is part of your duties to make the measurements after an accident, for maps, such as used here?

A. Yes, sir.

Q. And is it also part of your duties on such occasions to take photographs?

A. Yes, sir.

Q. All right, now, Mr. Luddon, referring—directing your attention to the accident in which Mr. Shanahan was killed, on December 27, 1948, at Anderson, California, at the Howard Street crossing, did you have occasion to visit the scene of the accident?

A. Yes, sir.

Q. And you remember when it was?

A. It was in the morning of December 27.

Q. That was the day of the accident?

A. Yes, sir.

Q. And did you take some photographs of the scene of the accident?

A. Yes.

Q. Now, first one, the photograph already in, two photographs already in evidence—I show you defendant's exhibit B, which has already been intro-

(Testimony of James R. Luddon.)

duced into evidence, and ask you whether or not you recognize that as a photograph which you [266] took?

A. Yes, sir; I do.

Q. Can you tell us when it was taken?

A. It was taken on December 27.

Q. And now can you tell us where the camera was at the time that picture was taken with reference to the main line track?

A. It was 25 feet from the center line of the main track.

Q. 25 feet which way?

A. On the east side of the track.

Q. Was that by actual measurement?

A. Yes.

Q. All right. And what does it show? Does it show the view down, in which direction down the track?

A. Shows the view to the north.

Q. At a point 25 feet from the main line of the track?

A. Yes, sir.

Mr. Phelps: Now, the jury has already seen it, but may I ask now, having identified the place 25 feet from the tracks, if we may pass it to the jury?

The Court: Yes.

Q. (By Mr. Phelps): I will show you another photograph while the jury is looking at this, and ask you if you can identify that as a photograph that you took?

A. Yes, sir, that was taken 25 feet from the center line of the main track. [267]

(Testimony of James R. Luddon.)

Q. The camera in the same position?

A. Yes, sir, looking at the crossing.

Q. Looking at the crossing itself, looking down onto the pavement to show the condition of the pavement and the crossing, is that right.

A. That is right.

Q. That is the purpose of that one. All right. Now, when was that taken.

A. On December 27.

Q. Same day? And does that correctly portray the scene as of the time when you observed it, took that picture directed down on the crossing?

A. Yes, it does.

Mr. Phelps: I offer that in evidence as defendant's exhibit next in order.

Mr. Murman: No objection.

The Clerk: Defendant's E.

(Whereupon the photograph referred to above was received in evidence and marked Defendant's Exhibit E.)

Q. (By Mr. Phelps): I show you another photograph and ask you if you can identify that photograph?

Mr. Phelps: I will pass defendant's exhibit E, with the court's permission, to the jury, taken looking down on the pavement a point 25 feet from the crossing.

A. Yes, that was taken 25 feet from the crossing, looking north. [268]

(Testimony of James R. Luddon.)

Q. Was it taken on the same day?

A. Yes, on December 27.

Q. And looking in the direction, in the northerly direction towards Redding? A. Yes.

Q. Looking down the track? A. Yes.

Q. All right. And does that correctly portray the view looking up the track in a northerly direction from a point 25 feet from the track?

A. It does.

Q. On the main line track?

A. In the center line of the main.

Mr. Phelps: I offer that in evidence as defendant's exhibit next in order.

Mr. Murman: No objection.

The Clerk: Defendant's Exhibit F, in evidence.

(Whereupon the photograph referred to above was received in evidence and marked Defendant's Exhibit F.)

Q. (By Mr. Phelps): I show you another photograph and ask you if you can identify it and tell us where it was taken and by whom?

Mr. Phelps: The photograph now handed to the jury, with the court's permission, another photograph taken 25 feet in [269] the crossing looking in the northerly direction which the train was coming.

Q. Can you identify that? A. Yes, sir.

Q. Where was that taken and when?

A. It was taken 50 feet from the center line of

(Testimony of James R. Luddon.)

the crossing on December 27, looking at the crossing. It is on the east side of the crossing.

Q. Looking in a westerly direction at the crossing?
A. Yes.

Q. And does that correctly portray the view that you just described as of the time you took it, December 27, 1948?
A. Yes.

Mr. Phelps: I offer that in evidence as defendant's exhibit next in order.

Mr. Murman: No objection.

The Clerk: Defendant's G, in evidence.

(Whereupon the photograph referred to above was received in evidence and marked Defendant's Exhibit G.)

Mr. Phelps: With the court's permission, I hand this picture taken 50 feet from the crossing to the jury for their inspection.

Q. Now, I show you a photograph and ask you if you can identify this photograph?

A. Yes, sir, that was taken 75 feet from the center line of [270] the main crossing, looking at the crossing from the east side, looking west.

Q. 75 feet?
A. Yes.

Q. When was that taken?

A. Taken December 27.

Q. At approximately what time, in the morning or afternoon?

A. In the morning, sir, about 10:30 or 11:00 o'clock.

Q. Now, then, directing your attention to a wig-

(Testimony of James R. Luddon.)

wag signal appearing on that, can you tell us whether or not that is the wig-wag as it was at the time? A. It was; yes, sir.

Q. And at the time you took that photograph the wig-wag was working? A. Yes, sir.

Mr. Phelps: I offer that in evidence as defendant's exhibit next in order.

The Clerk: Defendant's Exhibit H, in evidence.

(Whereupon the photograph referred to above was received in evidence and marked Defendant's Exhibit H.)

Mr. Phelps: We will pass this one, with the court's permission, to the jury, showing the view 75 feet from the crossing.

Q. I will show you another photograph and ask you if you can identify that and tell us when that was taken and where? [271]

A. That was taken December 27, 100 feet from the center line of the crossing, looking in a westerly direction. More at an angle, more of a southwest——

Q. Southwest?

A. Yes, more to—more to the west.

Q. Does that picture portray the view?

A. Yes, it does.

Q. As seen by you on the morning when you took this picture taken from that position?

A. Yes.

Q. Including a large puddle; was that there at the time? A. Yes, sir.

(Testimony of James R. Luddon.)

Mr. Phelps: I will offer that in evidence as defendant's next in order.

Mr. Murman: No objection.

The Clerk: Defendant's I in evidence.

(Whereupon the photograph referred to above was received in evidence and marked Defendant's Exhibit I in evidence.)

Mr. Phelps: Now, then, did you have an occasion to go back——

Mr. Phelps: May I pass this one, defendant's exhibit I in evidence, to the jury for their inspection.

Q. Did you have an occasion to go back at a later date and take other photographs?

A. Yes, sir. [272]

Q. At the scene of the accident?

A. Two weeks later.

Q. What date, do you remember?

A. January 10, sir.

Q. I will show you a photograph and ask you if you can identify that?

Mr. Murman: May I see it?

Mr. Phelps: I am sorry; certainly.

Q. Will you look at that photograph, and I ask you if you can identify where that was taken and when it was taken?

A. That was taken 150 feet from the crossing, sir, in a southwesterly direction.

Q. All right. And as of the time on January 10, 1949, to your observation had there been any change

(Testimony of James R. Luddon.)

in the conditions there at the scene of the accident?

A. No, sir.

Q. The matters shown in the photograph were the same as you observed them on December 27, is that right?

A. That's right, sir.

Q. Except, of course, for puddles or wet?

A. It wasn't raining that day on the morning.

Q. All right. And does that correctly portray the scene of the accident?

A. Yes, sir.

Q. At the time you took the picture? [273]

A. Yes, sir.

Mr. Phelps: We offer that in evidence as defendant's next in order.

Mr. Murman: No objection.

The Defendant's J in evidence.

Whereupon the photograph referred to above was received in evidence and marked Defendant's Exhibit J.) [273-A]

Mr. Phelps: And I show you a photograph and ask that you identify that.

A. Yes, sir, that was taken 200 feet from the center line of the crossing looking in a southwesterly direction there.

Mr. Murman: The same day as the other?

The Witness: It was taken January 10.

Mr. Phelps: I will pass Defendant's Exhibit J taken 150 feet from the crossing. (Passing to jury.)

Q. I have this last photograph which you have identified. Can you show me on there where the in-

(Testimony of James R. Luddon.)

cline to the highway starts? I mean the incline to the railroad tracks.

A. Well, approximately in here some place.

Q. Down here, indicating where the gravel and pavement stops and the gravel starts?

A. Yes.

Mr. Phelps: We offer this in evidence as defendant's Exhibit next in order.

(Thereupon the photograph referred to was received in evidence and marked Defendant's Exhibit K.)

Mr. Phelps: I will pass Defendant's Exhibit K, taken 200 feet from the crossing.

Q. There is another picture before that, which is already in evidence, Defendant's A. Can you tell us when that was taken and what that shows, if you took it?

A. That was taken on December 27, sir. It is looking north [274] at the crossing 100 feet from the crossing.

Q. All right; thank you. Now, Mr. Ludden, I will show you a composite panoramic view and ask you if you can identify that.

A. Yes, sir, it is—that was taken——

Q. What is it and what does it show?

A. It was taken on January 10. I believe I took that 26 feet from the center line of the crossing as it shows north there up the track and at the crossing and the view in between.

Q. Now will you explain to the jury how that was taken?

(Testimony of James R. Luddon.)

A. Yes, sir, set up the samera and first took one photograph and moved the camera and took the second and moved it some more and twisted or turned it and took the third.

Q. Leaving the tripod in the same position?

A. Yes, sir.

Q. Now, then,—and then piecing them together, making a panoramic view, is that right?

A. That's right, sir.

Q. And does that correctly show the scene there as it was observed there on January 10?

A. Yes, sir.

Q. 1949? A. Yes, sir.

Mr. Phelps: We offer that in evidence as Defendant's Exhibit next in order.

Mr. Murman: No objection. [275]

Q. 26 feet from the main line track——

The Clerk: Defendant's Exhibit L in evidence.

(Thereupon panoramic photograph was received in evidence and marked Defendant's Exhibit L.)

Q. (By Mr. Phelps): And finally, Mr. Ludden, I have three photographs here which I will show to you as one group from which that composite was made, the originals and ask you if you can identify——

Mr. Murman: There is no contention they were not made.

Mr. Phelps: I wanted to get the three individual photographs so they could see how the shooting of

(Testimony of James R. Luddon.)

the photographs was done, to place them together and simply to identify them.

Mr. Murman: There is no contention on our part that is not a composite.

Mr. Phelps: All right, fine.

I will ask permission, then, if Your Honor please, to show the jury that composite view taken 26 feet from the crossing.

Q. And these three photographs are the three photographs you took showing, which were used in this composite? A. That's right, sir.

Q. And all taken 26 feet from the crossing on January 10, 1949, and they correctly show the view with the camera in those positions?

A. Yes, sir.

Mr. Phelps: We offer these three in evidence, then, if Your [276] Honor please, separately, separate exhibits.

(Thereupon Defendant's Exhibits M, N, O, photographs, were received in evidence.)

Mr. Phelps: I have no other questions.

Mr. Murman: Does Your Honor wish to take a recess at this time?

The Court: Any cross-examination?

Mr. Murman: Yes, just very brief.

Cross-Examination

By Mr. Murman:

Q. On this one photograph, Defendant's Exhibit H, which shows the signal in operation, you said

(Testimony of James R. Luddon.)

that was taken in the morning, I believe, didn't you?

A. Yes, sir.

Q. About what time in the morning?

A. Well, I couldn't say exactly, sir.

Q. Well, about.

A. It would be about 11:30.

Q. 11:30?

A. Pardon me; it would be 10:30; 10:30 it would be.

Q. Daylight Saving time or Standard time?

A. That is true, so it would be——

Q. This is Daylight Saving time you are giving?

A. Yes, sir, Daylight Saving time.

Q. 10:30 in the morning? A. Yes. [277]

Q. And that shows the sky condition at that time, does it? A. Yes, it does.

Q. Overcast, wasn't it?

A. Yes, it was cloudy.

Q. Now, how did the signal happen to be operating? What was the physical fact of that point, do you know?

A. There was a train coming towards the crossing.

Q. From which direction?

A. From the north, sir.

Q. From the north. And what kind of a train was it, do you remember?

A. Yes, sir, it was a freight train.

Q. The same freight train you took pictures of in these other pictures. A. Yes, sir.

(Testimony of James R. Luddon.)

Q. That is referring to these pictures B and F, is that correct? A. Yes, sir.

Q. I thought that you had said that those other pictures were taken in the afternoon.

A. No, sir, I said these were taken in the morning.

Q. Did you take some in the afternoon?

A. January 10th, or on January 10 I took some in the afternoon.

Q. But all the pictures you took on the day of the accident here were taken in the morning, is that correct? A. That's right, sir. [278]

Q. You're certain of that, are you?

A. That's right, sir.

Q. You have any idea where that train was at the time the signal started to operate as shown there in the picture?

A. I don't know how far that holds.

Q. Now, you have—here is Defendant's Exhibit B showing the train there with the smoke pouring out of the funnel. Was that taken before or after this defendant's Exhibit H was taken?

A. After, sir.

Q. That was taken after? A. Yes, sir.

Q. All right. How long after, do you know?

A. As soon as I could set up the camera. I had to hurry quite a bit.

Q. Now, when the picture, Defendant's Exhibit H, was taken, have you any idea where that train was?

A. No, sir, I was set up at 75 feet from the—the

(Testimony of James R. Luddon.)

bell started ringing and I didn't look to see how far the train was up the track.

Q. When you took that, took the picture then, you didn't look to see where the train was when you actually took the picture? A. No, sir.

Q. Defendant's Exhibit H, you didn't look to see where the [279] train was?

A. No, sir, I didn't look to see where the train was as I took the picture.

Q. And you started, you took the picture as the signal started to operate, is that correct?

A. Yes, sir.

Q. So you can't tell us, then, the location of the oncoming train when you took Defendant's Exhibit H, because you weren't looking at it?

A. Beg pardon, sir, I didn't understand.

Q. You can't tell us the position of the oncoming train when you took Defendant's Exhibit H because you weren't looking at the train, is that it?

A. No, sir, I can't.

Mr. Murman: I have no further questions.

Mr. Phelps: May this witness be excused?

The Court: The witness may be excused, and we will take a ten minute recess. During the recess, ladies and gentlemen, bear in mind the admonition the Court has heretofore given you.

(Recess.) [280]

JAMES R. ROWE

called on behalf of the defendant; sworn.

The Clerk: State your name, please, sir; your full name.

A. My full name is James R. Rowe.

Direct Examination

By Mr. Phelps:

Q. Mr. Rowe, where do you live?

A. Cottonwood.

Q. Where is that?

A. That is about 16 miles north of Red Bluff.

Q. How long have you lived there?

A. Practically four years.

Q. By whom are you employed?

A. By the SP Company.

Q. In what capacity?

A. Signal Department.

Q. In the signal department, what is your position in the signal department.

A. My position in the signal department is to look after automatic signals, automatic wigwags, and everything pertaining to the automatic field of the railroad.

Q. You still have that same position?

A. Yes, sir.

Q. All right. Now, then, directing your attention to the town of Anderson, can you tell us whether or not your job had anything [281] to do with the maintaining and inspection, and so forth, of signals there in the stretch of road including Anderson?

A. Yes, sir.

(Testimony of James R. Rowe.)

Q. How long have you had the job? When did you first go to work in that job which included that section of the road?

A. I believe it was February of 1935, I believe it was—or 1945.

Q. 1945? A. Yes, February.

Q. Directing your attention to December 27, 1948, do you remember that there was an occasion when there was an accident at the Howard Street crossing in Anderson on that day. A. I do.

Q. Directing your attention to that date, can you tell us how much of the railroad, from where to where, did your duties require you to inspect and maintain these signals?

A. Well, my duties is to test that signal.

Q. One moment. I want to know how much of the railroad did you have charge of?

A. I had practically 23 miles.

Q. From where to where?

A. From Hooker to Redding.

Mr. Murman: What was that name?

Q. (By Mr. Phelps): Hooker, isn't that right?

A. That is correct. [282]

Q. Hooker, somewhere south, geographically?

A. That is it.

Q. South of Anderson? A. Anderson.

Q. Mr. Rowe, from time to time I will be asking you a question and if you can, I want you to answer them by using geographical directions rather than your railroad directions, which I know you are familiar with, but try to answer them, if you can,

(Testimony of James R. Rowe.)

north and south, having in mind that north is toward Redding from Anderson and south is toward Red Bluff, will you do that?

A. I will do that, sir.

Q. Now, Mr. Rowe, so that included within the signals which were under your care and supervision was the signal in Anderson at the Howard Street crossing, is that right? A. Yes, sir.

Q. And the other automatic signals in Anderson?

A. Yes, sir; there are two of them.

Q. All right. Will you please explain to us what type of signal there was at the Howard Street crossing?

A. It is what is known as the wigwag system.

Q. And I show your Defendant's Exhibit L, which is a panoramic view of the crossing. Will you point out the wigwag?

A. This is it here.

Q. What is this that I am pointing to?

A. That is a box with batteries and relays. [283]

Q. Does that have anything to do with this signal?

A. Yes, that operates the signal. It furnishes the battery and stuff to operate the signal.

Q. Where is the light in the wigwag?

A. Right there (indicating).

Q. What is this up above? A. Just a bell.

Q. To attract attention? A. Yes, sir.

Q. Where is the bell?

A. The bell sets right at the back side, the other side of that, what-you-call-it. It is a clapper bell.

(Testimony of James R. Rowe.)

Q. When it is activated by a train, it rings and the light goes on? A. That is right.

Q. Now, then, will you tell us, please, how that signal is operated. What happens when a train is within the circuit that causes it to ring?

A. Well, you take a southbound train, when it enters into the train circuit from that bell, it is 4600 feet, it starts that bell operating by shorting the circuit of it. What I mean by shorting, see, it drops the relay.

Q. First, what do you mean by shorting the circuit?

A. That is when a train enters the certain block we have.

Q. How does a train short it? You will have to explain that [284] to us.

A. A train shorts it by traveling over the track. We have insulated joints that divides one rail from the others, and those are all insulated with a fiber, and the moment a train passes over the fiber joint, it automatically shorts that circuit out.

Q. Is that a current of electricity that flows——

A. Through the rail.

Q. ——from the battery box here?

A. Yes.

Q. Comes through the track? A. Yes, sir.

Q. It went out the distance of your circuit, 4500 feet, 4600 feet, then flows back the other rail?

A. That is it.

Q. And comes back the rail, then enters again——

(Testimony of James R. Rowe.)

A. Into the battery.

Q. Into the battery box? A. That is it.

Q. Now then, that is a continuous flow of electricity, is that right?

A. Yes, sir, continuous flow.

Q. Is that by batteries or what, by current from the rails?

A. It is what we call an Edison wet cell battery.

Q. So that is a wet cell battery that puts the current through [285] the rail and it comes back again? A. That is right.

Q. Now, then, if for any reason there is a short created across the rails, what happens?

A. The signal automatically at Howard Street goes to ringing.

Q. All right. First what happens? What do we mean by a "short"?

A. I will explain it to you. When you short a track, it drops what we call a track relay.

Q. What is that?

A. That is a round, glass rigging with a bunch of fingers on it known as pick up and drop off contacts. Our signal works on a pickup circuit. When it is normal, no trains in the circuit, it has a flowing battery from one line down through the relay and back up the other side of the battery, and as soon as a train hits that circuit, or an iron is laid across the line or rail, that drops the relays in the pickup battery or the drop contact, and that starts the signal a-working.

Q. Now, is that, if I understand what you said,

(Testimony of James R. Rowe.)

the battery in the battery box here? A. Yes.

Q. Which flows current through the rail and comes back to the battery box? A. Yes.

Q. In addition to the flow through the rail, that current itself [286] does something? It holds——

A. The relay in normal position.

Q. It takes that current, makes that current flow continuously through the track and holds that as well to be sure that the wigwag won't work.

A. That is right.

Q. Then when the current is broken for any reason—— A. It stops.

Q. ——or some current goes over the circuit or for any other reason at all, the current no longer holds that relay up, it drops it?

A. That is right.

Mr. Murman: If the Court please, this is certainly leading and suggestive.

The Court: I think it is.

Mr. Murman: It is really in the interest of time, but counsel is going on and on.

The Court: I think you might lead the witness somewhat in this kind of testimony.

Mr. Phelps: I think there is no question about how it operates.

The Court: All right, proceed.

Mr. Phelps: I don't want to——

Mr. Murman: I realize that, but you are just going on and on and on. [287]

Mr. Phelps: I am trying to explain.

Q. It holds that up and when the current is broken it drops down. A. Yes.

(Testimony of James R. Rowe.)

Q. When that drops down, then, and the current is broken, what else happens?

A. There is a pickup battery or pickup contact, drop-away contact flows out through and up to the wigwag and starts the wigwag working.

Q. Is that another flow of current? There is through the rail——

A. It has an individual battery for the bell which is hooked up with this track relay. It is an individual battery, an Edison storage battery.

Q. Is that a separate battery?

A. That is a separate battery. It is an 88 volt battery.

Q. So that when the relay drops down, it then commences the current flowing from the separate battery into your wigwag is that right?

A. That is right.

Q. Then the separate battery operates a bell and wigwag and the light? A. That is right.

Q. That question, what means do you insure that the batteries are kept charged up? [288]

A. We have a 110 circuit, production of P.G.&E., that runs through the cable, runs a trickle charge that keeps the batteries in continuous charge 24 hours a day.

Q. Does that also apply to the other battery?

A. Not the track battery, no, just the wigwag battery?

Q. The one battery, that is, the wet battery?

A. Yes, sir.

Q. When you are inspecting, do you in the ord-

(Testimony of James R. Rowe.)

inary course of business, and did you on this occasion, immediately prior to this accident on December 27, 1948, what inspection——

A. My instructions are to do——

Q. No, what did you do?

A. All I done on that day was to test the battery. I shut the track relay out to drop the track relay.

Q. First let's get to the—I show you three pages there and ask you if you can identify those.

A. That is my shut tests, hours and days I make my tests on.

Mr. Murman: May I have the answer to that last question?

The Court: Read the answer.

(Answer read.)

Q. (By Mr. Phelps): Whose handwriting is that? A. My handwriting.

Q. Is that a report and record when you tested that signal on Howard Street?

A. Yes, sir. [289]

Q. From the 13th day of December through the 27th day of December, is that right?

A. Yes, sir.

Q. From that, and using it to refresh your recollection, can you tell us whether or not you inspected that signal on Howard Street on every working day from the 13th of December on, taking that as a start? A. Yes, sir.

Mr. Murman: Just a moment. The record is there was no inspection between the 24th and 27th.

(Testimony of James R. Rowe.)

Q. (By Mr. Phelps): The 25th was Christmas, was it? You didn't work that day?

A. No, I didn't work on Christmas.

Q. The 26th wasn't a working day?

A. No.

Q. The next working day after the 24th of December was the 27th. A. 27th.

Q. And you did inspect it on the 27th at 9:20, after the accident?

A. Somewhere around 9:00 o'clock is all I can say.

Q. Whatever the time is recorded there?

A. That is right.

Q. You don't remember exactly. At any rate, that does show the times you did inspect that, and will you tell us in your [290] ordinary making of those inspections, what you did use and what tests were made? This is not—I am not directing your attention and don't want you to tell me now—I am not now directing your attention to after the accident. I am now directing your attention to the regular maintenance tests which you made before the accident.

Mr. Murman: That is indefinite, if the Court please, because it isn't sufficiently covered there. I would suggest, if I may, that we start with the last time he tested it before the accident which would be the 24th, rather than just going into a series.

The Court: As I understand it, the witness testified he tested it every working day.

(Testimony of James R. Rowe.)

Mr. Phelps: I am now asking what he does when he tests that in the regular working day.

The Court: You understand the question?

A. Yes. I shut the track out, go over and look to see whether or not the bell is ringing and the light working. And that is my test, and I go up and look the mechanism over to see it is in working [291] shape.

Q. And when you first came up, where did you go?

A. Looked in the mechanism of the wig-wag.

Q. That is on top of the pole?

A. On top of the pole, yes, sir.

Q. Did you do anything with reference to fixing the batteries?

A. We take our battery readings every day, storage batteries, in the case for the bell.

Q. And checked to see they are charged up?

A. Yes, sir.

Q. And do you from time to time replace those batteries?

A. We have never replaced batteries since they was put in new.

Q. Always been charged up?

A. Always been charged up.

Q. No necessity for replacing.

A. No necessity.

Q. All right. Now, that is before the accident. Now then, Mr. Rowe, did you learn there had been an accident on the Howard Street crossing in Anderson on December 27?

A. Yes, sir.

(Testimony of James R. Rowe.)

Q. About when did you learn that?

A. It was about 8:05 in the morning when I went down to the depot.

Q. Where, what depot?

A. Cottonwood.

Q. Now, what did you do. [292]

A. Got down there to get my morning's lineup so I could travel over the road by motorcar.

Q. What did you do after you learned——

A. After that, the light engines went by, I proceeded towards Cottonwood, Anderson from Cottonwood.

Q. That would be in a northerly direction?

A. Northerly direction.

Q. You proceeded—how did you proceed?

A. On the motorcar up the track.

Q. That is a little mechanical machine?

A. Motorcar.

Q. Motorcar? A. Yes, sir.

Q. Gasoline motor. A. Gasoline motor.

Q. Runs on the main line, does it?

A. Runs on the main line.

Q. Now, then, when you—and then did you eventually arrive at Anderson?

A. I arrived at Anderson after all the trains went by.

Q. And had to wait for a passenger train to go by? A. Yes, had me blocked.

Q. Have to go into a siding, is that right?

A. I was at the Kulp, I was in the siding west of them.

(Testimony of James R. Rowe.)

Q. All right, then, when you arrived, what did you do? [293]

A. When I arrived I immediately—the scene of the accident was at Howard Street crossing. I took my motorcar off the crossing, walked over to the—looked at my battery and, oh, I know what it is—relay box there for the shunt box there, see that it wasn't broken.

Q. That is that other white box?

A. On the end of the point of the switch.

Q. Oh, where is that?

A. That sets back farther.

Q. Could you see that?

A. No, that has something to do, if it was broken, make the signals ring. I looked from there, come immediately back to my bell, opened it up, and shunted the bell out with the speedcop, and the corner was there and I made the shunt tests on that—Mr. Sublett.

Q. Before making those tests with the speedcop and the coroner, had you done anything, made any tests before that?

A. No, none whatever.

Q. With respect to the signal.

A. Nothing whatsoever.

Q. So that as far as you know it was in exactly the same condition?

A. When I tested it.

Q. When you tested it. Now then, when you made those tests, what did you do and what [294] did you observe?

(Testimony of James R. Rowe.)

A. When I make those tests, just always shunt that relay.

Q. And did you do that on that occasion?

A. We have a cord about that long (indicating) with two clips on it, reach in there, clip on to your relay, on to your pole sides of the relay, that takes the relay away, takes the battery away from the relay, and the moment you do that the bells automatically start working.

Q. What did it do on that occasion?

A. As soon as I did that, put the shot on, I walked around where I could see the light on my bell, the light was burning and the bell ringing.

Q. The wig-wag was oscillating?

A. The wig-wag was working.

Q. Now then, did you do that more than once?

A. No, just once, just a day's routine. Figure it works once, never failed, it would still work.

Q. Did you make any inspection on top of the pole?

A. No, I didn't go up on no pole, just on the wig-wag, it was, looking at the mechanism open and you can see the mechanism.

Q. And the mechanism you opened, is this the mechanism for the bell? A. The mechanism.

Q. And when you looked at that, did you see anything wrong? A. Nothing.

Q. And did you check the batteries? [295]

A. Yes, sir, I checked my batteries.

Q. Were they charged up?

A. Yes, they were charged up.

(Testimony of James R. Rowe.)

Q. And from your observation and as a result of your tests on the morning of the accident, did you find anything wrong with that wig-wag signal?

A. None whatsoever.

Q. Did it require any repairs?

A. No, sir, none whatsoever.

Q. Did you make any repairs?

A. No, sir.

Q. And did it thereafter continue in service without repair? A. Yes, ever since.

Q. Now then, and can you fix the time, will you fix the time from the record as to when that test was made on the 27th?

A. At 9:20 a.m. Monday morning.

Q. All right. Now, then, Mr. Rowe, what is it that causes the signal to cease to operate after the train had passed over the crossing and out of the crossing?

A. Well, out of that section, a section with insulating joints, the moment you get over these insulating joints, the relay will pick up again.

Q. When it goes over the insulating joint, the circuit is then open again and the juice then flows through the rails and that picks up the relays.

A. The circuit is closed. [296]

Q. The circuit is closed; I think I used the wrong term. At any rate, the current is going normally——

A. Stops the bell.

Q. Where is that mechanism—to cease to operate—where is that on this crossing?

(Testimony of James R. Rowe.)

A. That is about, as near as I can remember about six feet north of the Howard Street crossing.

Mr. Murman: What is that?

Mr. Phelps: Six feet north of the Howard Street crossing, is that what you said?

A. Yes, just about six feet.

Mr. Murman: That is where it cuts out?

Mr. Phelps: Cuts out, yes.

Q. All right. Now then, on the diagram here we have shown three tracks, the one track here, which is west of the—geographically west of the main track—has been indicated as a passing track. Are you familiar with that track?

A. Yes, sir.

Q. Now, down on North Street there are—at the time of the accident you had your flashing light indicators, is that right? A. Yes.

Q. Now, will you tell us whether or not the flashing indicators will be activated and will be flashing off and on when a freight train has pulled in from the northwesterly direction, pulled in and has cleared the Howard Street crossing so that [297] some cars are still, just a little south of the Ferry Street crossing, the other cars remain and continue over the North Street crossing, blocking the North Street crossing, will you tell us whether or not the flashing light indicators on North Street will be activated when a train is blocking that crossing?

A. Yes, sir, the flashers will automatically ring as long as that crossing is blocked.

(Testimony of James R. Rowe.)

Q. And what happens when the freight train clears that North Street crossing.

A. She quits ringing.

Q. So that the purpose of the North Street light is to warn that the North Street is either blocked, or a train on it? A. That's it.

Q. Now then, in the same station with the train on the siding blocking North Street, but not blocking Howard Street, will the—will the design of those wig-wags, will the wig-wag on Howard Street operate?

A. Yes, sir.

Q. Will the wig-wag on Howard Street operate after the train has cleared the crossing on the siding?

A. If it is long enough, yes, it will, but as long as it is covered that other crossing up there, that bell will ring.

Q. I am now talking about after it has cleared the Howard Street crossing, after clearing this crossing. A. Going west or north? [298]

Q. Going north.

A. Going south that will still ring as long as that is on the crossing siding.

Q. You mean the North Street lights will still ring? A. Yes.

Q. But the Howard Street crossing will cease to ring, is that right?

A. Well, cease to ring, that's right.

Q. So that the Howard Street crossing wig-wag will cease to ring just as soon as the train on the

(Testimony of James R. Rowe.)

main line, or the siding, will clear that crossing——

A. On the siding 60 feet before it clears.

Mr. Murman: If the court please, this is leading and suggestive. I am reluctant to call the court's attention to it, but it is going on and on and on.

Mr. Phelps: I didn't get the answer.

The Court: His answer was—read the answer.

(Answer read.)

Q. (By Mr. Phelps): 6 or 60 feet?

A. 60 feet.

Q. One other thing I didn't mention, ask you about, is there any difference in effect, Mr. Rowe, from making the test by shunting across your relays and a train short circuiting by being within the block? A. None whatsoever. [299]

Q. Does it make any difference so far as that relay operating, Mr. Rowe, as to where within the circuit it is shorted out?

A. Makes no difference where it is in the short.

Q. So that it is shorted out any place?

A. Any place.

Mr. Phelps: Incidentally, if your Honor please, I would like to offer in evidence the inspection reports and I should like to do so.

Mr. Murman: No objection.

The Clerk: Defendant's Exhibit P, in evidence.

(Whereupon the inspection reports referred to above were received in evidence and marked Defendant's Exhibit P.)

(Testimony of James R. Rowe.)

Q. (By Mr. Phelps): Mr. Rowe, having in mind the test made by you after the accident and findings which you made with the wig-wag oscillating, that the light was illuminated, that the bell rang when you shunted this across the relays, is there anything which you know could have, which would—could be wrong with that signal—wig-wag signal——

Mr. Murman: Just a moment, if the court please——

The Court: Let him finish the question.

Mr. Murman: The witness started to answer it. I am sorry, but I had to interrupt the witness, he was starting to make an answer.

Mr. Phelps: I will start it over again.

Q. Mr. Rowe, don't answer this question until Mr. Murman has [300] had a chance to object. I ask you on this morning of this accident from your observations of the tests that you made, having shorted across the—shorted the circuit across the relays, having observed that the signal oscillated, that the light lit, that the bell rang, and having then climbed up and inspected the mechanism of the bell and found nothing wrong with that, is there anything that you know of from your experience as signal maintainer could have been wrong with that signal, a matter of two hours or two and a half hours before and not wrong with it at the time when you made your observation?

Mr. Murman: It is objected to as leading and suggestive, invading the province of the jury, as-

(Testimony of James R. Rowe.)

suming something not in evidence, and certainly not binding on this plaintiff.

The Court: I will overrule your objection.

Q. (By Mr. Phelps): The objection was overruled; do you have the question in mind?

The Court: Read the question.

(Question read.)

A. I don't see how anything could be.

Q. (By Mr. Phelps): Very well. Now, one other thing. You mentioned a point where the signals go off. Do I understand that that is—will you state whether or not that signal goes off when the first car of the train goes over, or the last car——

A. The last car. [301]

Mr. Phelps: I have no other questions. You may cross-examine.

Cross-Examination

By Mr. Murman:

Q. Now, Mr. Rowe, you say you know of nothing. Isn't it a fact that this signal was out of order on several occasions before this accident?

A. Not since I have been maintaining that district.

Mr. Phelps: I will object. The answer is in, but so that I may be consistent, I object to that, if your Honor please, as incompetent, irrelevant and immaterial——

The Witness: Never was out of order.

(Testimony of James R. Rowe.)

Mr. Phelps: And also that it wasn't repaired and so forth——

Q. (By Mr. Murman): ' You mean by that at the time you have been——

Mr. Phelps: May I have a ruling?

The Court: I will overrule your objection.

Q. (By Mr. Murman): Do you mean from the time that you have been on duty here on the Shasta Division on this particular 23-mile strip of track, never had to repair that signal?

A. No, sir, never had.

Q. Never had to repair it——

Mr. Phelps: The record will show my running objection to this line of questions.

The Court: Yes.

Q. (By Mr. Murman): No reports have ever been made that the signal was out of order? [302]

A. No reports.

Mr. Phelps: Add to that, if your Honor please, it would be hearsay, and ask that the answer go out.

Q. (By Mr. Murman): Now, Mr. Rowe, after the accident occurred, you say that at the time of the accident there was a northbound freight on the—a passing freight on the west track?

A. As I understand it, yes, sir.

Q. Now, after that northbound freight approached this crossing of the main line, in order to take the switch here and go on the west siding, would it have activated this wig-wag if it had been working properly?

(Testimony of James R. Rowe.)

A. Until it got over the insulating joint 60 feet west of the bell—north of the bell.

Q. North of the bell. How far down the track?

A. 3600 feet.

Q. 3600 feet. In other words, 3600 feet to the south of the crossing the oncoming train activated the signal and 4600 feet to the north of the crossing?

A. Yes, sir.

Q. Why the difference?

A. There is an overlap of two bells.

Mr. Phelps: I object to that as already——

Q. (By Mr. Murman): Overlap of two bells, the bell at the Howard Street and the one at North Street? [303] A. Yes, sir.

Q. Would the 3600 feet to the south activate the North Street crossing at the same time?

A. At the same time.

Q. As the Howard Street? A. Yes, sir.

Q. And vice versa? A. Vice versa.

Q. All right. Now, as this train, this freight train, this 100-car freight train they had on the siding went off the main line on the switch and passed the 60 feet point north of the crossing which shut off the wig-wag, what happened in your relays when that took place?

A. When it gets in clear, the one on the North Street and this one will stop ringing.

Q. So that the train is still activating the flasher up at North Street, but the wig-wag stops?

A. Yes.

(Testimony of James R. Rowe.)

Q. And the train itself going on the siding stops this wig-wag at Howard, is that correct?

A. After it gets past the joints.

Q. After it gets past the joints. In other words, the actual operation of the train past the joints shuts off the wig-wag at the Howard Street point?

A. Yes. [304]

Q. So that—is that starting and stopping in the nature of throwing a switch in effect when it starts to open the switch, and when it stops in closing the switch; is that right? A. That's it.

Q. So that the train, in a sense, just does the switching operation in the relay?

A. Same as you work for a light.

Q. On the relay system the train acts as pressing the button to turn the light off and on?

A. Yes.

Q. Now, would the freight having turned the signal off as it got past here, how did that wig-wag, having been activated as in fact it had been activated at the time of the accident, by the oncoming passenger train?

A. From back here, from hitting that track circuit it automatically starts the wig-wag working.

Q. The oncoming train from the north would have acted to press the button, so to speak?

A. Yes.

Q. And as I understand it, all the tests you made, you yourself never placed anything across the rails, only at the relays?

A. At the relays.

(Testimony of James R. Rowe.)

Q. Whereas the train itself when it presses the button, so to speak, it presses on the track—— [305]

A. Yes, sir.

The Court: We will take a recess now until 2:00 o'clock. Ladies and gentlemen, bear in mind the admonition I have heretofore given you.

(Whereupon an adjournment was taken until 2:00 p.m. this date.) [305A]

December 27, 1949, 2:00 o'Clock

JAMES R. ROWE

resumed the stand on behalf of the defendant.

Cross-Examination

By Mr. Murman:

Q. Mr. Rowe, as I understand Defendant's Exhibit P, this is your own record of the tests that were made, is that correct? A. Yes, sir.

Q. Each one of these tests was made right at the relay? A. Yes.

Q. At no time did you ever go north of the track or south of the track from the crossing in making the tests?

A. We do if the shunt is in the switch position. I have made the same test. We do that quite often on the road.

Q. That is right at the vicinity of the crossing?

A. Yes.

Q. But apart from the vicinity of the crossing,

(Testimony of James R. Rowe.)

you have never gone south of the track or north of the track to make the test?

A. Yes, quite often, but when we get away from there we can't see the bell. You can hear the bell but you can't see it.

Q. Each one of the tests shown in this record for December, 1948, is a shunt test, isn't that right?

A. Yes.

Q. That is, they were tests you made right at the relay box, [306] isn't that right? A. Yes.

Q. The last test you made before the accident is shown here to be December 24, 1949, at 8:45 or 8:55? A. 8:55.

Q. The signal 2473 is the one in question in this case? A. 71.

Q. The time for the 2471 is 8:45?

A. Yes, sir.

Q. So you tested that at 8:45? A. Yes, sir.

Q. That was on Christmas Eve of 1948 in the morning, 8:45? A. Yes, sir.

Q. Then the next time you tested that same signal was not until 9:20 a.m. of December 27, 1948? That would be three days later?

A. Two days. Saturday, Sunday and Monday morning.

Q. But you tested that on Saturday morning?

A. No, Friday.

Q. Did Christmas come on Saturday?

A. We didn't work Saturday.

Q. Regardless of that, it was tested at 8:45 in the morning, the morning of the 24th?

(Testimony of James R. Rowe.)

A. Yes.

Q. Then not again until 9:20 in the morning of the 27th? [307] A. Yes, sir.

Q. That is the fact? A. Yes, sir.

Q. In the meantime, for that period that no tests were being made, the trains were operating on their regular schedule, weren't they?

A. Yes, sir.

Q. There was nothing done at the crossing to change the crossing? It was still the same crossing?

A. Yes.

Q. You weren't present when the collision occurred, were you? A. No, sir.

Q. I believe before lunch you told us at no time during those four years that you were there was the signal out of order?

A. Not that I recall, no, sir.

Mr. Phelps: The record will show my objection to this line of questioning?

The Court: Yes.

Q. (By Mr. Murman): Don't you recall, as a matter of fact, three or four months before this the signal was out of operation an entire day?

A. No, I do not.

Q. You don't know that? If that lack of operation occurred, and occurred on any day excepting Sunday, it would be a working [308] day, wouldn't it? A. Yes, sir.

Q. You testified, if I understood you, you tested it every working day? A. Yes, sir.

Q. You have put in evidence here, or your coun-

(Testimony of James R. Rowe.)

sel has, these records to show that from the 27th through to the 31st of December, 1948, you made shunt tests every day with the same results, that everything was O.K., isn't that right?

A. Yes, sir.

Q. Don't you know two days after the accident the signal was not operating until a locomotive southbound approached right there at the Howard Street crossing?

Mr. Phelps: Objected to, irrelevant, immaterial, what was done on other occasions.

Mr. Murman: Well, they have put it in evidence here.

The Court: That is asking something after the accident?

Mr. Phelps: After the accident.

Mr. Murman: They have put it in the record to show it was in good operating order. This goes to the evidence which they have submitted.

Mr. Phelps: If your Honor will recall my offer in this regard—if there was any question about it, I would like to have the record correctly reflect it—it was submitted, testimony, from the 13th to and including the date of the accident, [309] the 27th, and it happens that the remaining inspections appear on the same day, but it wasn't offered to show any inspection after that.

Mr. Murman: I misunderstood the offer, then. I thought it was to show a continuous proper operation.

The Court: I consider something that happened

(Testimony of James R. Rowe.)

three or four days later entirely irrelevant and immaterial.

Mr. Murman: Yes. As long as that is clear, I will not press it. I have no further questions of this witness.

Redirect Examination

By Mr. Phelps:

Q. Just one: Mr. Rowe, when a train is within the block, within the circuit, in what fashion does it short circuit it? How does it do that? Where does the current go?

A. The current goes back to the wheels, to the battery.

Q. The current is shorted up through the wheels, through the axle, and down again?

A. Yes, sir.

Q. That shorts it? A. Shorts it out.

Q. Now, then, if they have a short on the tracks, that causes the relay to drop and starts the wig-wag in operation? A. Yes.

Q. So that if there is a short the wig-wag will operate instead of the otherway around? [310]

A. Why, anything, a bar of iron or a tractor crossing across with steel cleats, will short the track out.

Q. When you make this test with a shunt, can you tell us whether or not the effect is the same?

A. Absolutely the same.

Mr. Phelps: No further question.

(Testimony of James R. Rowe.)

Recross-Examination

By Mr. Murman:

Q. That is, it is the same as far as you know, but at the time of shunting that box, you didn't necessarily have a train coming down the track?

A. No.

Q. Don't necessarily have another train on the siding? A. No.

Q. Don't necessarily have the tracks wet from rain? A. That has no effect on it.

Q. I mean, when you shunt it out, when you say that is the same thing, that is your own decision? A. That is no difference.

Q. Isn't it a fact electrical current passing through the rails in one direction and back again gets resistance one way?

A. I think so, but it is maintained so we don't lose about 1-100th of a volt through that circuit.

Q. That may be, but there is a difference in the current, running current all the way over the track and back again as between shunting that relay right at the signal? There is a [311] difference in the shunting of the signal?

A. Practically no difference.

Q. Well, practically——

A. There is no necessity shunting it way up the line. You get the same effect regardless whether or not you shunt it on the track or relay.

Q. If the signal is working properly?

(Testimony of James R. Rowe.)

A. Yes.

Mr. Murman: That is all.

Redirect Examination

By Mr. Phelps:

Q. If it is working properly, you get the same effect?

A. That is right.

Mr. Murman: So far as you are concerned?

A. That is my job, to tell whether they do work.

Mr. Phelps: No other questions.

Mr. Murman: No further questions.

Mr. Phelps: You may be excused:

JESSE A. STAINBROOK

called on behalf of the defendant; sworn.

The Clerk: State your full name, please, sir.

A. Jesse A. Stainbrook.

Direct Examination

By Mr. Phelps:

Q. Where do you live, Mr. Stainbrook? [312]

A. Dunsmuir, California.

Q. How long have you lived in Dunsmuir?

A. 33 years.

Q. By whom are you employed?

A. The Southern Pacific Company.

Q. In what capacity?

A. Locomotive engineer.

Q. How long have you been employed by the

(Testimony of Jesse A. Stainbrook.)

Southern Pacific Company, including your service as a fireman? A. Since 1916.

Q. When were you promoted from fireman to locomotive engineer? A. In 1925.

Q. Prior to that did you have any experience in and about in the engine service, or is that the extent of your experience? A. That is it.

Q. That is it? How long, then, have you been running a locomotive engine? Some period of time?

Mr. Murman: 43 years, then.

Mr. Phelps: Well, I had in mind part of the time of fireman—I will just ask the question:

Q. When you are a fireman, are you breaking in as a locomotive engineer, is that correct?

A. Yes, sir.

Q. So that over a period of time you are running an engine [313] when you are actually a fireman? A. Yes.

Q. All right, then, Mr. Stainbrook, where has your experience in the engine service for the Southern Pacific Company been, on what division?

A. The Shasta Division.

Q. Is that the division where Anderson is?

A. Yes, sir.

Q. Are you familiar, then, with the run from Anderson to Gerber? A. Yes, sir.

Q. And from Dunsmuir to Gerber?

A. Yes.

Q. Now, then, I direct your attention, Mr. Stainbrook, to December 27, 1948, and can you tell us whether you were an engineer on any particular

(Testimony of Jesse A. Stainbrook.)

train on that day? A. Yes, sir, on train 13.

Q. What is train 13?

A. Passenger train.

Q. Do you know the name of it? Does it have a number, name, or do you know, or do you know its just as 13?

A. For our part of it, it is the train of 13, the schedule.

Q. You were locomotive engineer on that train?

A. Yes, sir.

Q. Where did you go on duty? [314]

A. At Dunsmuir.

Q. Where did you terminate your duty that day?

A. Gerber.

Q. That is some distance south, or railroad west of Anderson, is that correct? A. Yes, sir.

Q. Mr. Stainbrook, when I ask you some questions about this, I know you are used to using your own terms of east and west. Now, will you try to use north and south, because that is the terminology we are using in this trial so far and the terminology the jury uses, so will you try to use north in the direction of Redding from Anderson and south in the opposite direction?

A. Yes, sir.

Q. As you were operating your engine out of Dunsmuir, do you remember how many cars you had? A. 15.

Q. 15? What type cars?

A. Passenger cars.

(Testimony of Jesse A. Stainbrook.)

Q. And what was the number of the locomotive?

A. 4431.

Q. Now, then, on that day as you were coming out of Dunsmuir and went on duty, did you make any tests of the brakes of your train? Were there any tests made? A. Yes.

Q. What tests were those? [315]

A. Before we leave the station we are required to make an air test of the train. After that test is made, and if the brakes are working properly, we are to release the brakes, and if they release properly, then we are allowed to go as far as their working is concerned.

Q. Was that done on this occasion before you left Dunsmuir? A. Yes.

Q. Now, then, as you were continuing and handling this train on from Dunsmuir south to Redding and up to the point of the accident at Anderson, did you have occasion between those two points to apply and use your brakes in normal course?

A. Yes, sir.

Q. Can you tell us whether or not your brakes operated properly as you applied them?

A. They did.

Q. Can you tell us whether or not your brakes and equipment were in good operating condition?

A. Yes, sir.

Q. As you left Redding, do you remember whether you were late or on time?

A. We were a few minutes late.

Q. Approximately how many, as you recall?

(Testimony of Jesse A. Stainbrook.)

A. Approximately 25 minutes late.

Q. You were on Daylight Saving Time?

A. Yes, sir. [316]

Q. And so that the difference from your scheduled time to your Daylight Saving Time was what is known as one hour runway, is that right?

A. Yes.

Q. Directing your attention back to the time that you were approaching Anderson, can you tell us whether or not, as you approached the town of Anderson, whether or not you sounded your whistles, any whistles, crossing whistles?

A. I did sound the whistles.

Q. All right, and where did you sound those crossing whistles?

A. We commenced sounding the whistles about a quarter of a mile north of Anderson and then continued all the way through.

Q. By north of Anderson, north of the North Street crossing at Anderson?

A. North of the Shell crossing.

Q. What is the Shell crossing?

A. It is where a Shell station, oil station, is just across the track from the highway.

Q. Is that a crossing north of the crossing shown on this map, or is it shown on this map? Will you step down to make sure you understand this map?

(The witness went to the blackboard.)

Mr. Phelps: I will explain this to you: The map shows the station, and then there is a crossing

(Testimony of Jesse A. Stainbrook.)

here at Howard Street, the one where the accident happened. Do you understand [317] that?

A. Yes.

Q. (By Mr. Phelps): Then there is a little crossing here at Ferry Street, and then there is a crossing at North Street with a store, and are there any more crossings north of that, not shown on this map?

A. The Shell crossing would be considered to the north of that as shown on the map.

Q. From that point on, did you or did you not continue to make crossing signals?

A. I did continue to.

Q. Now, then, can you give us your approximate speed as you were going through the town of Anderson and opposite the station and up to the time when you applied your brakes?

A. It was about 70 miles an hour.

Q. Is that within the permitted speed set for you?

A. Yes.

Mr. Murman: Objected to as calling for a conclusion of the witness.

The Court: Well, is that set by law, that speed?

Mr. Phelps: No, that is a limit. There is no speed limit set by law.

Mr. Murman: I move that the answer go out.

Mr. Phelps: The limit I was seeking to elicit from him is a limit set by the company itself. [318]

Mr. Murman: That is self-serving, what their own speed limit is. The question here is whether or not the train was being properly operated.

(Testimony of Jesse A. Stainbrook.)

Mr. Phelps: Very well, Mr. Murman, if I may have a stipulation that there is no contention of violation of any company rule in respect to speed I will withdraw the question.

Mr. Murman: I know of no violation of company rule of speed.

Mr. Phelps: Withdraw the question, then, with that stipulation, so that is not in the case.

Q. Now, then, Mr. Stainbrook, can you tell us whether or not the bell was sounded?

A. The engine bell was ringing.

Q. That is what I am talking about, the engine bell.

A. Yes, sir.

Q. Is that done, that is, the ringing operation, is that done by the fireman or the engineer?

A. The fireman.

Q. And the whistle, who sounds that, you or the fireman?

A. I do. The engineer does.

Q. In the operation of a locomotive, where do you sit, the engineer, where does he sit?

A. On the right side of the cab.

Q. On the right side of the cab in the direction of movement?

A. Yes, sir. [319]

Q. And the fireman, where does he sit?

A. On the left side.

Q. Can you tell us whether or not his view from the right side is obstructed by the boiler of the locomotive?

A. His is not.

Q. That is, some distance down the track.

A. I beg your pardon. I thought you meant across the cab.

(Testimony of Jesse A. Stainbrook.)

Q. Oh, I see what you mean. Yes, I see, in the cab itself. No, I am directing your attention to the view of the engineer as you are operating your locomotive, you sit on the engineer's side, on the engineer's seat box, you look out of the window on that side? A. Yes, sir.

Q. As you looked, was your view obstructed for close objects by anything?

A. It is from the length of the boiler out to the front, it is.

Q. To the extent that your view is obstructed by the boiler, will you tell us whether or not that view is seen by the fireman and, in turn, you rely upon him? A. Yes, sir.

Q. Now, then, getting to the accident itself, did you see the automobile before the impact?

A. No.

Q. What was it, then, that first called your attention that [320] there was about to be an accident?

A. The fireman called to me to "hold them."

Q. What do you mean, "hold them"?

A. That means an emergency.

Q. And in railroad language, does that indicate anything you have to do with respect to the brakes?

A. It means to apply the brakes in emergency then.

Q. When the fireman hollered that, what did you do?

A. I applied the brakes in emergency.

Q. And did you do that immediately?

(Testimony of Jesse A. Stainbrook.)

A. Yes, sir.

Q. All right, and after applying the brakes in emergency, did you see anything in respect to an automobile or any debris?

A. Do you mean before the accident or——

Q. Before the impact. What was the next thing you saw?

A. The next thing I saw after that was a large flash of light and heard an impact.

Q. All right. Now, then, how far, if you know, did the head end of your train travel beyond the Howard Street crossing, approximately?

A. Approximately a half mile.

Q. During that time, may I ask you, were your brakes set in emergency?

A. I beg your pardon?

Q. During that time and as a continuation, were the brakes of [321] your train set in emergency?

A. Yes, sir.

Q. And from your experience as an engineer, from your—you have given us the speed you were going, the equipment you were handling. Can you state whether or not that stop was a good emergency stop under the circumstances?

A. It was.

Q. Now, then, did you go back to the scene of the accident, or were you required to remain with your train?

A. I stayed with the engine at the engine. [322]

Q. At the engine. Directing your attention once again to the time preceding the accident, can you

(Testimony of Jesse A. Stainbrook.)

tell us whether or not the headlight of your locomotive was burning? A. It was burning.

Q. And can you tell us whether or not that train is equipped with one or two headlights?

A. Two headlights.

Q. Can you tell us one or both headlight were working? A. Both were.

Q. Now, how far in your experience will the headlights of that locomotive burn as they were at the time, show up an obstruction, say, of a man on the tracks, how far down the tracks will the beam show up such an object?

A. Well, approximately—I would say from 800 to 1000 feet.

Q. Can you tell us whether or not your headlights on this morning were in good working order or not? A. They were.

Q. They were in good working order?

A. Yes, sir.

Q. Both of them? A. Yes, sir.

Q. Now, did you see as you were approaching Anderson, did you see any train on any siding or passing track?

A. Yes, there was a northbound freight train on the side track.

Q. And which track would that be? [323]

A. That would be the track closest to the highway.

Q. On your side? A. Yes, sir.

Q. Now, in addition to the signals that you have already told us about for the crossings, did you

(Testimony of Jesse A. Stainbrook.)

sound any signal with your—any signal with respect to the train on the siding, any warning signal in respect to it?

A. Yes, I blew the crossing whistle approaching that train to warn them that we were coming.

Q. Now, as you were approaching Anderson and still out in the country, not yet up to the train in on the siding, can you tell us whether or not the second light on the locomotive was oscillating?

A. It was.

Q. And do you know to your knowledge whether that condition of oscillating was changed or not as the train approached the train on the siding?

A. It was changed, yes.

Q. And in what respect?

A. That instead of oscillating it shone directly down the tracks.

Q. And why was that done?

A. For the purpose of the men on the freight train to identify our train more easily.

Q. Light wouldn't shine in their eyes? [324]

A. Yes, sir.

Q. Is that a requirement that men of the other train observe your train and identify it?

A. Yes.

Q. Now, do you know whether that headlight condition of being straight ahead in a fixed position was changed to oscillating position at any time before the accident?

A. It was.

Q. About where?

A. About the caboose of the freight train.

(Testimony of Jesse A. Stainbrook.)

Q. Can you fix for us the best you can approximately where that caboose was?

A. The caboose was just over, as I remember, the crossing north of the station.

Q. And on the map that would be the Ferry Street crossing that I am now talking about?

A. Yes, sir.

Q. And by "over" you mean just south or just north? A. Just south of it.

Q. So that it had the Ferry Street crossing blocked as well as the North Street? A. Yes.

Q. Now, who operates the headlights, turns it on and turns on the oscillating or non-oscillating?

A. The fireman. [325]

Q. What was the condition with respect to daylight or darkness, as you remember?

A. It was just before the break of day, enough that it was still dark.

Q. I beg your pardon, I am sorry, I didn't hear.

The Court: Just before the break of dawn, enough so that it was still dark.

Q. (By Mr. Murman): So that your headlights would pick up objects, is that correct?

A. Yes, sir.

Q. And so far as the state of the weather, atmosphere conditions, can you tell us whether or not it was clear or stormy?

A. It wasn't stormy, it was cloudy.

Q. And was there any mist?

A. Yes, it was misty.

Q. Can you tell us whether or not the mist was

(Testimony of Jesse A. Stainbrook.)

such as to interfere with your vision or whether you could see, nevertheless see objects through the beam of your headlight ahead in the normal course?

A. We could.

Q. It didn't interfere with that? A. No.

Q. Now, then, will you explain to the jury how you, as an engineer, look out and whether there is any—describe the operation of any windbreak or shield so far as your vision [326] is concerned?

A. On the front of the cab at the side immediately in front of where the window was, the side windows, there is what we call a storm window, a window perhaps that wide and the length of the window in height (indicating) and that is also for our protection from wind, rain or sand, whatever it might be, and that is the protection we have to look out from the side of the cab ahead.

Q. So that the air that passes between is deflected out and you can look ahead without the aid of a windshield wiper? A. Yes.

Q. That is true of rain, too? A. Yes.

Q. Now, then, so far as you are concerned, did you have any opportunity to observe whether or not the wig-wag at the Howard Street crossing was operating or not?

Mr. Murman: I object to that as leading and suggestive, if the court please.

Mr. Phelps: How is that leading?

Mr. Murman: This is counsel's own witness.

The Court: I don't think that is leading. Go ahead and answer.

(Testimony of Jesse A. Stainbrook.)

A. I didn't see the wig-wag working.

Q. Tell us whether or not your attention was on other things or whether you were looking——

Mr. Murman: That is immaterial, if the court please.

The Court: Overruled. Answer the question.

A. Yes, sir, I was busy with trying to stop the train.

Mr. Phelps: That is all. You may cross-examine.

Cross-Examination

By Mr. Murman:

Q. You, having had a total of, that is up to the time of the accident, as I understand it, of some 32 years' experience in the Shasta Division; is that correct? A. Yes, sir.

Q. And part of that was as a fireman in the cab of an engine and the bigger part was an engineer in the cab of an engine; is that correct?

A. Yes.

Q. Now, will you tell us on the average about how many trips you would make over the Shasta Division from Gerber to Dunsmuir and back in a week, for example, prior to December, 1948?

A. I couldn't tell you definitely, no. It would depend upon what kind of a run I had, whether or not an extra run or a regular run.

Q. Well, would it be fair to say on the average of at least once a week you made one trip to the north to Dunsmuir and another trip back to Gerber?

(Testimony of Jesse A. Stainbrook.)

A. I don't believe it would be that, I should say that because it might be longer than that that I wouldn't make the trip to Gerber. [328]

Q. From Dunsmuir, you mean? A. Yes.

Q. Stop short of Gerber somewhere?

A. No, would run north of Dunsmuir.

Q. Run on the northern part of the division then? A. Yes.

Q. I see. The Shasta Division then has two divisions, northern and southern division, from Dunsmuir—— A. It is different districts.

Q. Districts. I used the wrong word. The northern district and the southern district is the same division, is that correct?

A. They have it from Dunsmuir to Klamath Falls, Dunsmuir to Ashland, Klamath Falls to Alturas and Dunsmuir to Gerber.

Q. Then we have four districts in a division, is that correct? A. Yes, sir.

Q. I see. All right. Now, prior to the accident had you been working in the district from Dunsmuir to Gerber? A. Yes, sir.

Q. About how long?

A. I think since June regularly.

Q. Regularly since June? A. Yes, sir.

Q. And prior to June of 1948 you hadn't been in the district but on other occasions—— [329]

A. I had been on a regular job to Klamath Falls.

Q. Had that been true for the full scope of your experience? [329-A] A. No, no.

(Testimony of Jesse A. Stainbrook.)

Q. In other words, you shifted around?

A. Yes, sir.

Q. Since June of 1948 until the time of the collision at least you were in the district from Dunsmuir to Gerber?

A. Yes, sir.

Q. At that time, would it be fair to say that you traversed the distance on a round trip from Dunsmuir to Gerber and back on an average at least of once a week?

A. We went more than that.

Q. More than that?

A. Yes. Every other day.

Q. Every other day you would make a round trip, every other day?

A. Yes, sir.

Q. As a matter of fact, isn't it true that on the day prior to the accident you had taken No. 14 north to Dunsmuir, hadn't you?

A. No, I think not.

Q. Well, the defendant has furnished me with some exhibits here which I have a photostatic copy of, an original apparently, and it shows that you were the engineer on No. 14, which apparently went from Gerber north to Dunsmuir; that is the complement, is it not, of 13?

A. Yes, sir. [330]

Q. And the same train as No. 14 to the north, or to the east, as you people use the expression, and No. 13 is from the north to the south, or to the west?

A. Yes.

Q. I have here a photostatic copy of the dispatcher's record of movement of trains, Mr. Stainbrook, showing apparently that you left Gerber—this is your name, isn't it, Stainbrook?

(Testimony of Jesse A. Stainbrook.)

A. Yes.

Q. You left Gerber at 9:00, somewhere around 9:00—I can't read the writing, and then took that train north to Dunsmuir, arrived at 12:37 a.m. Does that refresh your recollection that you had taken that particular train on the preceding evening, or is that what the document shows?

Mr. Phelps: Now, I will object as to what the document shows. I have no objection to cross-examination using that to refresh his recollection, but my understanding of that would be, if I read that correctly, it would be 9:35 the same day that he went back that night.

Mr. Murman: That may be; it doesn't show a day; maybe the witness can tell us.

Mr. Phelps: I don't know.

The Witness: Can I explain to him?

The Court: Yes.

The Witness: We would go to Gerber from Dunsmuir on any date and would leave Gerber at 9:50 the same day, that is, [331] providing the train was on time, and arrive at Dunsmuir the next morning, 12:35, we were due there.

Q. (By Mr. Murman): Make the round trip in one day?

A. Yes, sir, but arrived at Dunsmuir the morning of the next day.

Q. Yes, I see. And then you skip a day and make a trip on the next day? A. Yes, sir.

Q. That clears that up. Now, in those runs that you made, Mr. Stainbrook, you went to, necessarily

(Testimony of Jesse A. Stainbrook.)

went through the town of Anderson, didn't you?

A. Yes, sir.

Q. Go through one way going south and then go through going north? A. Yes.

Q. You were familiar with the crossing in Anderson, were you not? A. Yes.

Q. You knew the North Street crossing at the north portion of the town, the Ferry Street, Howard Street, and I believe there was a fourth street, South Street; it doesn't show on the map, isn't that correct? A. Yes.

Q. And did you know about the various signals that appeared at these crossings for traffic that would cross the tracks at [332] those points, did you know about those signals? A. If——

Mr. Phelps: If I may, I should like to make an objection as to any crossings other than the one the accident——

The Court: It will be limited to that.

Q. (By Mr. Murman): Were you familiar with the signal at the Howard Street crossing?

A. Yes.

Q. You had seen it on several occasions, had you? A. Yes.

Q. We have here Defendant's Exhibit O, which shows a picture of it. Is that the crossing signal? So far as you can remember? A. Yes.

Q. Do you know how long that crossing signal had been there? A. No.

Q. Have you any recollection or way of telling us about how long it had been there, according to

(Testimony of Jesse A. Stainbrook.)

your own knowledge? A. No, I haven't.

Q. Would you say it had been there six or seven years or ten years or less time, or how long?

Mr. Phelps: I will object as incompetent, irrelevant and immaterial—it has been some time before.

The Court: I will let the witness answer, if he knows.

A. It has been there a long time, but stating the time, I [333] wouldn't know.

Q. You can't tell us now in years how long?

A. No, sir.

Q. Is that correct? Now, on the day in question, as I understand it, you left Dunsmuir at a very early time in the morning, is that correct?

A. Yes, sir.

Q. I think you were called about 5:00 o'clock, weren't you? A. 5:10 on duty.

Q. You were called on duty and then you took over the train at about 5:25 or somewhere before 6:00, isn't that correct?

A. When we left, yes. [334]

Q. Now, at the times that you took the train over to Dunsmuir did you receive any train orders as to what the conditions were down the track?

Mr. Phelps: I object to that as calling for hearsay.

Mr. Murman: It can be answered yes or no, if the court please.

The Court: Yes, you can answer it yes or no.

A. We received only a clearance card.

(Testimony of Jesse A. Stainbrook.)

Q. (By Mr. Murman): That was at Dunsmuir?

A. Correct.

Q. And that clearance card had to do with the right of way you would expect to traverse south to Gerber? A. No.

Q. How far south? A. To Redding.

Q. To Redding. Did you make a stop at Redding? A. Yes.

Q. And at Redding did you receive any train orders? A. Yes.

Mr. Phelps: Same objection.

Q. (By Mr. Murman): Did those train orders refer to the freight that was to be on the siding at Anderson?

Mr. Phelps: Same objection, calling for hearsay.

The Court: He said no.

Q. (By Mr. Murman): Did you know when you left Redding that [335] there would be a freight on the siding here at Anderson? A. No.

Mr. Phelps: Same objection, it is incompetent, irrelevant and immaterial, nothing to do with the accident.

Q. (By Mr. Murman): When did you first become aware of the freight being on the siding at Anderson?

Mr. Phelps: Same objection.

The Court: Proceed.

A. When we were close enough that I could see the lights from his indicators.

Q. And what lights are those that you are referring to?

(Testimony of Jesse A. Stainbrook.)

A. Those are the lights that are in his number boxes showing the number of his train.

Q. That is up on the front part of the engine, up above the boiler, is it?

A. Up on the top, near the top of the boiler in front.

Q. And those number boxes are in what shape, sort of a rectangle shape, are they?

A. Yes, about that long (indicating) but will hold indicator numbers, 4 by something, I believe they are, and the height like that (indicating) that is on either side.

Mr. Murman: May the record show the witness indicated an area of about two feet by ten inches?

Q. Would that be a fair area, Mr. Stainbrook, of those number boxes? [336]

A. I don't know the size of them.

Q. Well, approximately. You have been a railroad engineer now for many, many years, seen those number boxes on the front of locomotives?

A. Oh, yes.

Q. What would be your estimate as to the size, approximately?

A. Approximately eight inches by twenty.

Q. Thank you. And one on each side, is there not?

A. Yes.

Q. Illuminated, are they?

A. Yes, sir.

Q. Now, these particular number boxes you have called them, were they illuminated with numbers on them or were they just open spaces of light?

(Testimony of Jesse A. Stainbrook.)

A. They had numbers.

Q. Numbers on them. And you say those were the first things that you saw, is that correct?

A. Yes.

Q. How about the headlight on the freight, was it out? A. It wasn't burning.

Q. Not burning. About how far were you from the freight when you saw those number boxes?

A. I don't know how far we were from him, we were not very far.

Q. Well, the train light, 15 cars away? [337]

A. Yes, that's right.

Q. That would be a fair distance, would it?

A. Yes.

Q. You're sitting in the cab then on the right side looking out and saw these number boxes on the freight engine that was headed in your direction, is that correct? A. Yes.

Q. About how long is a car on a passenger train?

A. They vary in length, 50-70 feet.

Q. Now, did you have any idea by looking at that number box and the numbers on it as to the length of that freight train? A. No.

Q. The track there is safe, isn't it?

A. Yes, sir.

Q. And when you saw the number boxes on the freight, was your headlight and operating Mars light, was it illuminating the right of way down past the freight engine? A. Yes.

Q. Isn't it a fact, Mr. Stainbrook, that those lights that shone down there a thousand feet, as

(Testimony of Jesse A. Stainbrook.)

I understand it, 800 to a thousand feet, it illuminated the train before you saw the number boxes?

A. I didn't see it with the light until I saw the number plates.

Q. Well, you yourself didn't see the train until you saw the number plates, isn't that correct? [338]

A. Yes.

Q. But you did tell us, did you not, that with your headlights on full and your Mars light oscillating that it would show down the track some 1000 to 800 feet, is that correct? A. Yes.

Q. And you were less than that distance from the head end of the freight, were you not, when you saw the number boxes? Or were you?

A. Well, I don't know the exact distance of that. If we were, if we were a shorter distance than that——

Q. All right. Now, as you came up to the freight your headlights would illuminate the cars on down the right of way, that would be on the lefthand side of the freight train, would they not? A. Yes.

Q. And couldn't you see the length of cars extending on down the track from a long distance from the engine from the freight engine, that was on your side, wasn't it? A. Yes.

Q. Couldn't you see those cars?

A. Oh, yes, I could see those cars there.

Q. And couldn't you see that they extended into Anderson and across these crossings down to some point south of the Ferry Street crossing?

(Testimony of Jesse A. Stainbrook.)

A. After we were a ways past I did and I could tell, yes. [339]

Q. By the way, when you stopped your Mars light from oscillating, did you dim the lights too?

A. No.

Q. You kept them on full? A. Yes.

Q. You were on full beam then from the time that you first, or beyond the time and continuing past the time that you saw the freight engine and freight train down the track? A. Yes.

Q. But the difference was that you stopped the oscillation of the Mars light? A. Yes.

Q. Now, about how far were you from the North Street crossing, to begin with, when you saw that the freight train was blocking the North Street crossing?

A. Well, I wouldn't know exactly, but we were some little ways north of that when I could tell that he was blocking the crossing.

Q. Were you as far north as the beam of your headlight shone out in front of you; in other words, a thousand feet? A. I don't know that.

Q. No, but I am asking if that is approximately about the distance?

A. When I noticed that the caboose was beyond the crossing I could plainly see it there. [340]

Q. Well,—

A. The distance, I don't know.

Q. That was past the Ferry Street crossing, wasn't it? A. Yes, sir.

Q. So that the caboose, which was at the tail end

(Testimony of Jesse A. Stainbrook.)

of the freight train, that blocked beyond the North Street and Ferry Street crossings? A. Yes.

Q. Now, when were you aware of the freight train blocking the North Street crossing, where were you on the track coming into Anderson?

A. I don't know that, I don't know just where we were, but we were north of that, up there somewhere.

Q. When you first saw that the freight train was across the North Street crossing, where were your headlights showing up objects, beyond North Street or just picking up the North Street crossing?

A. No, we could see beyond there.

Q. You could see beyond there. When you saw that the freight train was across the North Street crossing, is that correct? A. Yes.

Q. How far beyond could you see with your headlight, could you see as far as the caboose?

A. I don't know that, I don't know just where we were in regard to our place on the track at the time I could see the [341] caboose.

Q. No, that wasn't my question. My question was at the time that you saw that the North Street crossing was blocked by the freight, I understood you to say the beam of your headlight was beyond that point. Now, my question was, how far beyond the point was the beam of your headlight; in other words, did the headlight illuminate the caboose at the time you first noticed the freight across the North Street crossing?

(Testimony of Jesse A. Stainbrook.)

A. Well, I don't remember that; I don't know that, where we were then.

Q. You mean at the time that you were aware of the freight train being on this siding and being across the North Street crossing, you don't recall where you were in the southbound passenger that was going toward the Howard Street crossing, is that correct? You don't know where you were at all.

A. I don't know where we were in regard to seeing where the caboose was at that time.

Q. You don't understand my question. My question is, when you saw the freight at the North Street crossing could you, at the same time, see the freight, the caboose beyond the Ferry Street crossing? That is the question.

A. Well, that I can't remember about that because——

Q. You, at any time, remember seeing beyond the North Street crossing and Ferry Street being blocked by the same train?

A. Yes. [342]

Q. All right. Now, where were you when you saw that; were you beyond North Street, that would be north of North Street?

A. I don't know that.

Q. You don't know that?

A. No, sir.

Q. What is your best recollection?

A. I have no recollection of that as to our position of those crossings.

Q. Let me ask you this question: When you were aware of these two crossings being blocked, were you still north of the North Street crossing?

(Testimony of Jesse A. Stainbrook.)

A. I don't know that.

Q. You don't know that? A. No, sir.

Q. And you have no recollection on it, is that correct?

A. Not in regards to that North Street crossing and the caboose.

Q. Did you have something in the cab that was attracting your attention? A. No.

Q. You were sitting there on your engineer's box on the right side where you can see down the right side of the track; were you sitting there looking out of the window? A. Yes.

Q. You said earlier it was misty. How could you tell it was [343] misty?

A. Well, just by the weather condition, of the mist that was blowing in the air.

Q. You could see the mist in the air, is that correct?

A. No, not exactly that, but you could feel it as it was out past our storm window.

Q. Didn't see it in the air, didn't see a fog-like atmospheric condition, a misty condition in the air, the atmosphere wasn't clear?

A. But it wasn't foggy.

Q. What was impairing its clearness? If it wasn't mist, was it something else?

A. Well, it was cloudy and misty.

Q. Low clouds? A. No.

Q. Overcast, is that correct?

A. Overcast, yes.

(Testimony of Jesse A. Stainbrook.)

Q. Was the mist sufficient to accumulate moisture on your storm window or any of the windows of your cab?

A. Not enough that it bothered us at all, or impaired our vision.

Q. And still you say sitting there on the right side of the cab you can't tell me if you were north of the North Street crossing when you noticed both of these crossings blocked, is that correct? [344]

A. No.

Q. Now, did you slacken your speed at any time?

A. The speed may have slackened a little before we were to that next crossing.

Q. Now, which is the next crossing, the Howard Street crossing? A. Yes, sir.

Q. And would that be due to the brake applications? A. No.

Q. What would it be due to?

A. It would be due to the fact that there is a slight upgrade there.

Q. A slight upgrade at Anderson?

A. Yes.

Q. It is generally a downgrade from Dunsmuir to Anderson, is it not?

A. From Anderson——

Q. Let us take it from Redding to Anderson; generally it is downgrade, isn't it?

A. Not particularly, no.

Q. You mean you go up and down, rise and then fall?

(Testimony of Jesse A. Stainbrook.)

A. I don't mean that exactly. Coming into Anderson from the north it is slightly downhill.

Q. Yes.

A. And going through Anderson toward the south and there it [345] is slightly uphill.

Q. Well, had you taken the power off the drivers then as you approached Anderson; is that what you were doing?

A. Not exactly that, but working a light throttle.

Q. Working a light throttle? A. Yes.

Q. Some acceleration but not a full throttle?

A. That's right.

Q. And was that light throttle being used because of the slight upgrade in Anderson?

A. No, that—it was used to maintain the speed we were making.

Q. All right, you didn't slacken your speed, is that correct; you would maintaining it?

A. Yes.

Q. That speed was 70 miles an hour, as I understand it; is that correct? A. Yes, sir.

Q. Now, you said it was still dark, isn't that correct? A. Yes.

Q. And you were still using full headlights, is that right? A. Yes.

Q. Prior to the collision at the Howard Street crossing, did you say you didn't see anything of the right of way ahead of you prior to the collision?

A. I didn't, no.

Q. You didn't see anything? A. No.

Q. So that when the fireman called out to you,

(Testimony of Jesse A. Stainbrook.)

“Hold them,” I think you used the expression, you didn’t have any idea at that time that there was anything ahead of the engine; is that correct, that is, that you could see? A. That’s right.

Q. Now, when you were north of the North Street crossing here, Mr. Stainbrook, did you blow your whistle? A. Yes.

Q. And how far north of the crossing were you when you blew your whistle?

A. Well, I was blowing the whistle, you might say, not just continually, but intermittently from a quarter of a mile north of there.

Q. What do you mean by “intermittently”?

A. Well, I would blow for the crossing whistle and then immediately repeat it.

Q. And what were the intervals of time between the blowing of the whistle?

A. Just a few seconds.

Q. A few seconds. And when you say a few seconds, can you give us anything more definite, or do you know? A. No. [347]

Q. Would it be more than two seconds or just two seconds or less?

A. Perhaps it would be a little more than a second, or two seconds, like that, and perhaps just a little less than that.

Q. So somewhere around two-second intervals you were blowing the whistle, is that correct?

A. That or less.

Q. Now, as I understand it, you were on the right side of the cab, is that correct?

(Testimony of Jesse A. Stainbrook.)

A. Yes.

Q. And as you approached the Howard Street crossing you said that you didn't see the wig-wag signal; is that correct? A. Yes.

Q. What were you looking at as you came down the track from North Street to Howard, do you remember? A. Looking down the track.

Q. Looking down the track, that is, your attention wasn't diverted to something in the cab, still maintained your look-out position? A. Yes.

Q. These two headlights that you had on the front of the train, did they throw a beam to either side, to the left and to the right?

A. The oscillating, the Mars headlight—when it is oscillating. [348]

Q. Yes. Well, as the train is further removed from the object ahead, the beam spreads out?

A. Yes.

Q. Even the stationary light, isn't that correct?

A. Yes.

Q. Now, as you came down from North Street to Howard Street, wouldn't the beam of the headlight spread out to illuminate the whole crossing at Howard Street, so far as you could tell?

A. It illuminated the crossing as we were coming straight down the track.

Q. You mean its illumination was concentrated on the main line after crossing the Howard Street?

A. No, not exactly that, it illuminated as far as whatever the beams throw there.

Q. Well, could you see either to the right or to

(Testimony of Jesse A. Stainbrook.)

the left of the Howard Street crossing by the head-light beam as you approached the crossing?

A. I could see to the right of it, yes.

Q. What obscured your seeing to the left? Now, I am speaking now where you are back at the North Street——

A. I don't understand just what he means.

Q. Well, I will reframe the question.

The Court: Let's take a recess. Ladies and gentlemen, we will take a recess for ten minutes and during the recess bear in mind my former admonition to you.

(Recess.) [349]

Q. (By Mr. Murman): Mr. Stainbrook, when the fireman called out to you "Hold them," do you have any idea about where the engine was at that time as it was approaching the Howard Street crossing? A. Well, approximately 200 feet.

Q. 200 feet? Now, that is one thing you can recall, is that right? A. About that.

Q. Yes. How do you happen to recall it was about 200 feet? Were you some place on the track that fixes that in your mind?

A. Yes, we weren't to the crossing yet.

Q. Had you crossed the Ferry Street crossing?

A. Yes.

Q. Were you opposite or beyond or in front of the station here?

A. Well, I don't know exactly that. The station

(Testimony of Jesse A. Stainbrook.)

is on the opposite side. I don't know exactly where we were in regard to the station.

Q. Well, you of course knew the station was between Howard Street and Ferry Street. You had been by that many times, hadn't you?

A. Yes.

Q. Well, can you state why you have some idea you were about 200 feet? What fixes that distance in your mind? What was it makes you—give us your recollection.

A. On account of him calling to me as he did, I knew it. [350]

Q. But he was in the cab with you.

The Court: Let him finish his answer, Mr. Murman.

Mr. Murman: Pardon me.

The Court: He started to say he knew something.

A. I knew there was some reason for him telling me what he did, and the way he told me, and I knew that we were not to the crossing, and it is just in my mind approximately that distance.

Q. It is based on the speed you were going, 70 miles an hour? That is about one hundred and two or three feet a second, isn't it, or do you know?

A. About 105 feet a second, I believe.

Q. 105 feet a second? Was it about two seconds from the time the fireman called out to you to "Hold them" that the collision occurred at the crossing?

(Testimony of Jesse A. Stainbrook.)

A. Well, that thing, I don't know, but the time, it was very shortly after he hollered to me.

Q. You can't tell us now just how you have that definite recollection of 200 feet except that the fireman called out to you, and that is your best recollection, is that right? A. Yes, sir.

Q. Now, are you sure, Mr. Stainbrook, that you were blowing the whistle for two seconds intervals, all the way down the track to the time of the collision? Are you sure of that?

A. I don't know that I said two seconds. It may be less than two seconds, but immediately after passing over that crossing, [351] with conclusion of that whistle, then right away I would start the next whistle.

Q. (Do you remember giving your deposition to the coroner after this accident occurred? Do you remember the incident on December 27, 1948, at 5:00 o'clock p.m., you gave a deposition to Claude E. Whiteman, coroner of Shasta County, California, where one E. N. Harold, shorthand reporter, was present, and you were sworn by the coroner; do you remember that? A. Yes.

Q. I have here what purports to be——

Mr. Phelps: May I see it?

Mr. Murman: Don't you have a copy? (Handing document to counsel.)

Mr. Murman: By the way, while counsel is reading that, do you recall whether you blew the whistle, if you did blow it as you came to the

(Testimony of Jesse A. Stainbrook.)

Howard Street crossing, before or after the fireman called out, "Hold them," do you?

A. I was blowing it when he called to me, as nearly as I remember that.

Q. I will ask you to look at this and state whether or not you recall giving the answers that appear on page 2 of the deposition to the questions commencing at line 24 and concluding at line 25. Now, you read it over to yourself. Did you give those answers to those questions? [352]

Mr. Phelps: I will object to that, if your Honor please. This man is not a party to this action. It isn't binding on the defendant, Southern Pacific Company, and it is hearsay and is incompetent, irrelevant and immaterial what was said on other occasions.

The Court: It will be overruled.

Mr. Phelps: If there is going to be proof of this by other means, then I suggest that statement be made by counsel.

The Court: He has asked if he made them and he can testify whether he did or not.

Mr. Murman: That is the question.

Q. Did you give those answers to those questions, Mr. Stainbrook?

A. I don't know; I don't remember if that is the exact statement I made to him.

Q. Well, there are several answers here. Can you point out any other answer that you don't recall having given, or does your answer that you have just given me go to all the answers that you

(Testimony of Jesse A. Stainbrook.)

gave within the page area I directed your attention to? A. To read it all, you mean?

Q. You said you don't recall if your answers to them were the answers you gave to the questions set forth here in the deposition, isn't that correct? Is that what you just told me? A. Yes. [353]

Q. All right now, which answer don't you recall giving, or is it your answer that you don't recall giving any of them?

Mr. Phelps: To which, if your Honor please, I object as not a proper way of impeachment. This is not a party defendant.

The Court: Overruled.

Mr. Murman: Let him answer the question, please.

Q. Do you understand the question?

A. Well, hardly, no.

Q. My question is this: You said you don't recall giving those answers, is that right? Is that what you said? I thought that is what you said.

A. I said, what I meant to say, is that I don't recall, I don't remember if that is the way I answered, or the answer I gave him. I don't remember whether or not that is how I answered this question.

Q. Let me ask you this: Do you remember the questions as they are set forth here having been asked of you?

A. I remember him asking me if I knew where we were when the fireman hollered to me to "Hold them."

(Testimony of Jesse A. Stainbrook.)

Q. Yes. I think that is on the first page. That is on the first page here. Do you remember the answer to the question that appears on the bottom of the first page?

Mr. Phelps: My objection goes to this entire line of questioning, your Honor. [354]

The Court: Yes.

Mr. Phelps: I don't think it is a proper way to get at impeachment. There is a proper way.

Mr. Murman: I am trying to find out if he remembers, Mr. Phelps. I haven't proceeded to the impeachment part yet.

A. The last question I remember of him asking me that, yes.

Q. (By Mr. Murman): This, "Did you see the car after it was hit," and your answer, "No."

A. Yes.

Q. But you don't remember the preceding question and your answer you gave there of some one, two, three, four, five, six, seven lines?

A. I didn't read that.

Q. Oh, I thought that is what you were looking at. Will you look at that? That is what I thought you just referred to when you said you remember him asking you about the fireman calling out to you. Do you remember giving that answer?

A. Yes.

Q. Then you remember giving the answer to the next question, don't you? A. Yes.

Q. All right.

Mr. Phelps: I submit, if your Honor please,

(Testimony of Jesse A. Stainbrook.)

this is not proper cross-examination, asking him to remember making certain questions and answers. It isn't impeachment and would [355] be hearsay, have to be proved by somebody else. This isn't a proper way to go about it, and it is incompetent, irrelevant and immaterial and hearsay, and not binding on the defendant, Southern Pacific Company, as not a party. Mr. Stainbrook is not a party.

The Court: I think it is proper to ask from the witness if he remembers making certain answers to certain inquiries made of him at a different time if it pertains to what he has already testified to. You can ask him whether or not he remembers it, first. If he does not remember it, you can't use it to impeach him. If he does, you can use it to impeach him, if it refers to something that is an impeachment.

Mr. Phelps: Yes, your Honor.

Q. (By Mr. Murman): Do you remember the answer that you gave to the next question as it appears there? In other words, read down the page there and tell me whether you remember making those answers to those questions.

Mr. Phelps: Mr. Murman, will you show me what you are pointing to when you are through?

Mr. Murman: Yes.

Mr. Phelps: Just so I will know.

Mr. Murman: Yes, surely. I thought you had a copy of it.

Q. (By Mr. Murman): Have you finished?

A. Yes, sir.

(Testimony of Jesse A. Stainbrook.)

Q. Do you remember giving the answers to the questions there? [356]

A. I remember giving the answers to some of that.

Q. But you don't remember as to others, is that right?

A. I don't remember all of them as answering those questions. I don't remember that, no.

Q. That pertains particularly to the part that I called your attention to first, between lines 14 and 25? A. Well——

Q. That is the part that I called your attention to first.

A. I don't remember of answering it that way, no.

Q. All right. Now, as your train approached this crossing, did you see any persons on the crossing, any individuals at all, any people?

A. No.

Q. And as you looked down beyond the crossing, down the right of way, was it clear ahead of the train down the right of way as far as you could tell? A. You mean——

Q. Beyond the crossing.

A. You mean nothing on the track?

Q. Yes. A. Nothing I could see, no.

Q. Could you see the track as you came down the right of way prior to crossing Howard Street?

A. Yes.

Q. About how far in front of the engine, Mr. Stainbrook, would [357] you say the boiler cut off

(Testimony of Jesse A. Stainbrook.)

your view of the right of way itself, of the main track? A. I don't know. I don't know.

Q. Well, about how far? You have been a locomotive engineer now for 24 years, or up to the time of this accident. What is your best estimate as to how far in front of the locomotive would your vision be obscured by the boiler?

A. Well, I wouldn't know how far because I have never had an opportunity of measuring that distance and I wouldn't know. Now, you take a distance from the front end of your engine to where your view is cut off, the distance from there and the distance looking from that, from the side back at the back end of the boiler, the distance perhaps would be considerably different in being correct, in knowing, and I don't believe that I could fairly give an estimate of that distance.

Q. Can you estimate it in boiler lengths if you can't estimate it in feet? A. No.

Q. Well, let me ask you this question: When you were at Ferry Street, which is approximately, according to this map, a distance of 20 feet to each inch, approximately 500 feet, could you see from where you sat in the cab, could you see across the main line tracks over to the east siding when you were back here 500 feet at Ferry Street?

A. I didn't. [358]

Q. You mean you didn't look, is that what you mean? A. May I explain?

Q. Could you answer the question, then you can

(Testimony of Jesse A. Stainbrook.)

explain it. Just tell me, you mean you didn't look, or were you looking?

A. I was looking down the track.

Q. Looking down the track? Now, you want to make an explanation?

The Court: Go ahead.

A. When we were coming to Anderson, those crossings as close as they are together, we approach that crossing and whistle for that and we are there immediately, and then there is another crossing beyond that that we are looking for anything that may be on that or on the track intervening, and I wasn't looking out to that side to see how far I could see or if I could see across those tracks.

Q. You mean you were traveling so fast that as you came down here you couldn't see what was on this crossing sufficiently clear to permit you a complete observation ahead down the line?

A. No, I didn't say it that way. I said my mind was centered on down the track.

Q. Just down the track? Could you have seen the east siding from the North Street crossing? That is almost 1000 feet. That is about 900 feet, according to this scale. Could you see when you were up at North Street, could you see the east siding? [359]

A. I don't know that you can see it there. You can see it a distance ahead of the engine.

Q. On that particular morning you have no recollection, then, when you were at North Street,

(Testimony of Jesse A. Stainbrook.)

of seeing the east siding here at Howard Street, is that correct? A. That is correct.

Q. Did you at any time see the east portion of the Howard Street crossing as you came down the right of way there? Do you remember seeing it at any time? A. I don't remember of that.

Q. Was the station in your way at any time in looking down at the east side of the Howard Street crossing?

A. It didn't obstruct my view from the right side down the track.

Q. Did you see the station at any time that you were approaching Howard Street crossing?

A. Yes, I saw the station.

Q. Where were you when you saw the station?

A. North of it somewhere.

Q. Do you know whether you were north of Ferry Street or north of North Street or beyond that, or do you know?

A. We weren't too far north of it when I could see it.

Q. North of the station? A. Yes.

Q. When you say, "too far," where do you mean, were you north [360] of Ferry Street?

A. I don't know whether we were or not.

Q. Do you know if you were north of North Street? A. North.

Q. Isn't it a fact you were going so fast you just couldn't keep track of your position?

A. No, no, it wasn't.

(Testimony of Jesse A. Stainbrook.)

Q. Is that the normal speed through Anderson, 70 miles an hour?

A. For a passenger train, yes.

Q. Was it the mist that stopped you from seeing any of those crossings?

A. No, it was what I told you, that my mind is fixed on the crossings ahead and what might be there and those crossings as we approached them.

Q. You mean by that when you are at Ferry Street your mind is fixed on Howard Street?

A. Not necessarily. The intervening track, also.

Q. Intervening track? You mean the main line track? Is that the intervening track?

A. It is the space between where I can see and where we are.

Q. You don't recall seeing any flagman at this crossing, is that correct? A. No.

Q. Did you see any of the train crew of the caboose out by the caboose as you went by? [361]

A. No. I saw—I saw a light go from the left side of the track to the right side before we got there to the caboose.

Q. You saw a light? You mean by that a lantern or something of that kind?

A. To me it would be a trainman's lantern, yes.

Q. You didn't see who was carrying it?

A. No.

Q. Where were you when you saw a trainman's lantern going across from the east to the west to where the caboose was, where were you on the track? A. We were considerably north of it.

(Testimony of Jesse A. Stainbrook.)

Q. How far? A. I don't know how far.

Q. Well, were you north of the North Street crossing? A. I don't know of that.

Q. You can't tell us now when you saw this lantern light traveling the area east to west down here by the caboose, can't tell us whether you were by the Ferry Street—between Ferry Street and North Street or North Street and Howard Street?

A. No.

Q. What was the matter with your headlights? Didn't they light up the individual who was carrying it down here?

A. You could distinguish that it was a person walking, but to tell who it was, I couldn't tell that.

Q. Oh, you could see it was a person walking?

A. There was a person walking across.

Q. You did see that in addition to the lantern, is that correct? A. Yes.

Q. All right, does that help you fix the point that you were on on the tracks when you saw a person walking with a lantern? A. No, it doesn't.

Q. It does not? A. It does not.

Q. I show you a panorama of that area that we are concerned with, which is Defendant's Exhibit L, I believe. At any time as you came down that track at 70 miles an hour do you remember seeing any recent obstruction on the railroad track? Do you remember seeing any telegraph poles, for example?

A. No, I didn't see them.

Q. Do you remember seeing a semaphore?

A. I saw the light in it.

(Testimony of Jesse A. Stainbrook.)

Q. How far back were you when you saw the light in the semaphore?

A. I don't know. You can see the light for a long ways.

Q. When you say a long ways now, were you north of North Street again or not?

A. You can see that light north of North Street, yes.

Q. Did you see it when you were north of North Street?

A. I don't know. We see the light up there a long ways up the track.

Q. You don't know whether you were north of North Street at the [363] time or not?

A. No.

Q. Do you remember seeing anything else than the man carrying the lantern and those other things that you have mentioned as you came down this main line at 70 miles an hour toward that crossing? Is there anything else you saw there that you can recall now?

A. What do you mean by that? Of obstructions, or what do you mean?

Q. Well, you told us that, you do recall seeing this east siding, you do recall the end of the caboose between Ferry Street and Howard Street, you do recall seeing somebody walk across it with a lantern, you do recall the station over here, you do recall the signal here, called a wig-wag signal. Now, do you recall seeing this crossing button and stop sign down here on the east side of Howard Street?

(Testimony of Jesse A. Stainbrook.)

A. No.

Q. Do you recall seeing this switch standard here south of Howard Street? A. Yes.

Q. You do recall seeing that? A. Yes.

Q. And what causes you to recall seeing that, what is in your mind to make that stand out?

A. Because if that switch were wrong, that target was wrong, it [364] would show red to us.

Q. Did you see any red? A. No.

Q. What did you see there?

A. Saw that it was not lined red.

Q. Could you see any color at all, you are giving that—you didn't see red, did you see anything there, if you didn't see red? A. I didn't see a color.

Q. You saw an object there, is that correct?

A. Yes.

Q. And it was not red, is that right?

A. That's right.

Q. Did you see this crossing buck, as it is called, at the Ferry Street crossing, which was on the right side of the train as it went south; do you remember seeing that? A. No, I didn't see that.

Mr. Murman: I don't think I have any further questions.

Redirect Examination

By Mr. Phelps:

Q. Mr. Stainbrook, you mentioned that the—you were still using full headlight. May I ask you in the daytime on a passenger train now, and at that time, did you still leave your headlight on full?

(Testimony of Jesse A. Stainbrook.)

Mr. Murman: I object to that as immaterial, if the Court please; the witness testified it was dark.

The Court: He has already stated that they were on. I will allow it.

Mr. Phelps: Yes.

The Court: All right.

Mr. Phelps: My position was to show they remained on.

The Witness: Yes, they were on.

Q. (By Mr. Phelps): That has to do with the regular headlight, is that right? Now, you were asked something about this switch stand. One of your duties is to check the switch to see if they are lined properly? A. Yes.

Q. If it is not lined properly, what happens? It throws the train in the ditch, doesn't it?

A. Yes.

Q. And you can remember that. Something mentioned about working a light throttle to maintain speed. Did you change the amount of steam as you were going uphill into Anderson, or did you leave the throttle at the same?

A. The throttle was left as it was, coming into Anderson.

Q. As the train then went uphill with the throttle in the position you left it, would it lose speed, or not? A. It would lose speed, yes.

Mr. Phelps: I think that is all.

(Testimony of Jesse A. Stainbrook.)

Recross-Examination

By Mr. Murman:

Q. You said that it is your duty to observe the switch [366] standards. Wasn't it also your duty to examine the wig-wag and other crossing devices?

A. Yes.

Mr. Phelps: That is objected to, if your Honor please, as—calling for conclusion, and ask the objection precede the answer.

Mr. Murman: I submit it is proper, if the Court please.

The Court: I think I will allow it to stand.

Mr. Murman: No further questions.

Redirect Examination

By Mr. Phelps:

Q. Mr. Stainbrook, as you were approaching the crossing your duties require you to watch out for vehicle traffic on and approaching the crossing, is that correct? A. Yes.

Q. On your side. And you're checking the crossings beyond, too, aren't you; is that what you have told us? A. Yes.

Q. Now, then, in the operation of the business of bringing the train to a stop, has your attention been diverted from the business at hand? In other words, does that require you to use levers and other devices to bring the train to a stop?

A. Yes.

(Testimony of Jesse A. Stainbrook.)

Q. Would that divert your attention from observing the things around the crossing?

A. It would. [367]

Mr. Phelps: No further questions.

Mr. Murman: No further questions.

Mr. Phelps: May this witness be excused, your Honor?

The Court: As far as I am concerned.

Mr. Murman: Yes, I have no objection.

Mr. Phelps: Call Mr. Kafer, please.